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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit's re-endorsement of the University of Texas at Austin's use of racial preferences in undergraduate admissions decisions can be sustained under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner in this case is Abigail Noel Fisher.

Respondents are the University of Texas at Austin; Pedro Reyes, Executive Vice Chancellor for Academic Affairs in His Official Capacity; Daniel H. Sharphorn, Vice Chancellor and General Counsel in His Official Capacity; William Powers, Jr., President of the University of Texas at Austin in His Official Capacity; Board of Regents of the University of Texas System; R. Steven Hicks, as Member of the Board of Regents in His Official Capacity; William Eugene Powell, as Member of the Board of Regents in His Official Capacity; Ernest Aliseda, as Member of the Board of Regents in His Official Capacity; Alex M. Cranberg, as Member of the Board of Regents in His Official Capacity; Brenda Pejovich, as Member of the Board of Regents in Her Official Capacity; Robert L. Stillwell, as Member of the Board of Regents in His Official Capacity; Wallace L. Hall, Jr., as Member of the Board of Regents in His Official Capacity; Paul L. Foster, as Chair of the Board of Regents in His Official Capacity; Jeffery D. Hildebrand, as Member of the Board of Regents in His Official Capacity; Susan Kearns, Interim Director of Admissions in Her Official Capacity; William H. McRaven, Chancellor of the University of Texas System in His Official Capacity.

Plaintiff-Appellant below Rachel Multer Michalewicz is being served as a respondent herein.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Abigail Noel Fisher respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. The Court's prior decision in this case ("*Fisher I*") reaffirmed that traditional strict scrutiny applies when a university's use of racial preferences in its admissions process is challenged. The Fifth Circuit's initial ruling instead deferred to the University of Texas at Austin ("UT"). The Court vacated that ruling and remanded the case to the Fifth Circuit to determine whether UT had offered sufficient record evidence to satisfy that exacting standard.

A panel of the Fifth Circuit, this time over the vigorous dissent of Judge Garza, again failed to apply traditional strict scrutiny. Essentially ignoring the Court's admonition to hold UT to the demanding burden articulated in its Equal Protection Clause precedent, the Fifth Circuit approved UT's program under what amounts to a rational-basis analysis. The panel deferred to UT's post hoc speculation that racial preferences served a "qualitative" diversity interest that was never studied, evaluated, or articulated when UT added racial preferences to its admissions program. Worse still, the interest is based on demeaning and unfounded stereotypes about less-privileged applicants from minority communities. Without any evidence that such an interest is educationally compelling, that consideration of race is necessary to advance it, that UT's use of race is narrowly tailored to achieve it, or that the end point of such an amorphous and unbounded pursuit could ever be subject to judicial review, the Fifth Circuit held that UT's use

of racial preferences somehow survived the demanding scrutiny that *Fisher I* mandates.

If not reviewed, the Fifth Circuit's decision will signal to universities and courts throughout the nation that strict scrutiny is a *pro forma* exercise and that *Fisher I* is a green light for racial preferences in admissions decisions. The Court should grant the petition, strike down UT's unjustified use of race, and once again make clear that the Equal Protection Clause does not permit the use of racial preferences in admissions decisions where, as here, they are neither narrowly tailored nor necessary to meet a compelling, otherwise unsatisfied, educational interest.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 758 F.3d 633 and is reproduced in the Appendix ("App.") at 1a-90a. The Fifth Circuit's order denying rehearing en banc is reported at 771 F.3d 274 and is reproduced at App. 94a-98a. The Fifth Circuit's earlier opinion is reported at 631 F.3d 213 and is reproduced at App. 147a-260a. The Fifth Circuit's earlier order denying rehearing en banc and the opinion dissenting from the denial of rehearing en banc are reported at 644 F.3d 301 and are reproduced at App. 318a-330a. This Court's opinion vacating the Fifth Circuit's earlier opinion is reported at 133 S. Ct. 2411 and is reproduced at App. 99a-146a. The opinion of the United States District Court for the Western District of Texas is reported at 645 F. Supp. 2d 587 and is reproduced at App. 261a-317a.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit rendered its decision on July 15, 2014. App. 91a. A timely petition for rehearing en banc was denied on November 12, 2014. App. 94a. This Court has jurisdiction under 28 U.S.C. § 1254(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall ... deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. UT's Use Of Race In Admissions Decisions

The Court previously described the evolution of UT's admissions program from one that considered race as an independent factor to one that generated substantial minority admissions through race-neutral measures to the system challenged in this case where race is again explicitly and pervasively considered in admissions and placement decisions. App. 100a-104a.

Under the first system, which operated prior to 1997, admission to UT turned on "two factors: a numerical score reflecting an applicant's test scores and academic performance in high school (Academic Index or AI), and

the applicant's race." App. 100-101a. In 1997, UT adopted the second system in response to a Fifth Circuit decision invalidating UT's use of racial preferences under the Equal Protection Clause. App. 101a. Admission to UT under the new race-neutral system still turned on two factors, but a Personal Achievement Index (or "PAI") replaced racial preferences. *Id.* The PAI measured a "student's leadership and work experience, awards, extracurricular activities, community service, and other special circumstances," *id.*, including some that "disproportionately affect minority candidates, [such as] the socio-economic status of the student's family, language other than English spoken at home, and whether the student lives in a single-parent household," App. 267a. UT coupled its AI/PAI system with expanded minority outreach programs. App. 101a. These race-neutral efforts resulted in a 1997 entering class that was 15.3% African-American and Hispanic. App. 267a-268a.

A year later, the Texas Legislature supplemented the AI/PAI system with the Top 10% Law, which grants automatic admission to in-state students in the top ten percent of their high school class. App. 101a-102a; *see also* H.B. 588, Tex. Educ. Code § 51.803 (1997). The AI/PAI calculations retained a vital role in UT's process, however, because they determined admission for students that were not automatically admitted under the Top 10% Law and determined placement in schools and majors for all applicants, including those admitted pursuant to the Top 10% Law. App. 102a.

As this Court noted, UT's "revised admissions process, coupled with the operation of the Top Ten Percent Law, resulted in a more racially diverse environment

at the University." App. 102a. In 2004, without racial preferences, UT enrolled a freshman class that was 21.4% African-American and Hispanic; in 1996, with racial preferences, UT had enrolled a freshman class that was 18.6% African-American and Hispanic. *Id.* And importantly, the race-neutral system produced students that succeeded academically. According to UT, minorities "earned higher grade point averages ... than in 1996 and [had] higher retention rates."[1]

In spite of the success of its race-neutral program, UT announced on the day that this Court decided *Grutter v. Bollinger*, 539 U.S. 306 (2003), that it would "modify its admissions procedures" to incorporate "affirmative action."[2] Shortly thereafter, UT created a "Proposal To Consider Race and Ethnicity in Admissions" ("Proposal"), which gave "formal expression" to UT's "plan to resume race-conscious admissions." App. 102a.

As this Court recognized, UT's Proposal advocated a return to racial preferences "in substantial part" because "a study of a subset of undergraduate classes containing between 5 and 24 students ... showed that few of these classes had significant enrollment by members of racial minorities." App. 103a. UT also relied on "what it

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1. Dr. Larry Faulkner, *The "Top 10 Percent Law" is Working for Texas* (Oct. 19, 2000), *available at* http://www.utexas.edu/president/past/faulkner/speeches/ten_percent_101900.html (last visited Feb. 9, 2015).

2. *The University of Texas at Austin reacts to the Supreme Court's affirmative action decisions* (June 23, 2003), *available at* http://www.utexas.edu/news/06/23/nr_affirmativeaction/ (last visited Feb. 9, 2015).

called 'anecdotal' reports from students regarding 'their interaction in the classroom,'" *id.*, and on "significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population," App. 292a. The Proposal did not include any analysis of the background or individual characteristics of the minority admissions that its race-neutral system produced. It instead faulted the race-neutral system for not ensuring greater racial diversity at the classroom level (without investigating any other reasons—such as student choice—for that problem) and assumed that increasing total minority admissions by considering race would ameliorate the problem. App. 291a-292a. UT's own study, however, showed that its measure of classroom diversity decreased while minority enrollment was increasing steadily between 1996 and 2002. App. 293a.

The Texas Board of Regents approved UT's proposal to add racial preferences to the PAI calculation in fall 2004. App. 103a. Race was added to the first page of each admissions file, and "reviewers are aware of it throughout the evaluation." App. 280a. Every applicant is thus labeled by race, and each can be affected by the racial preferences because AI/PAI scores determine admissions for non-Top 10% Law applicants and placement in schools and majors for all applicants. App. 102a-103a.

Notwithstanding the prevalence of race in its revised admissions program, adding race to the AI/PAI calculation has produced negligible increases in minority enrollment. At the admissions stage, the only applicants potentially affected by race were non-Top 10% students.[3]

3. In 2008, roughly 81% of the class was automatically admitted under the Top 10% Law, significantly reducing the pool of applicants that can be admitted based on race. App. 3a. During

The vast majority of those students would have been admitted irrespective of racial preferences. A comparison of the percentage of non-Top Ten "underrepresented" minority students enrolled when race was not part of the admissions calculus to the percentage of non-Top Ten "underrepresented" minority students enrolled in 2008 illustrates the point. From 1998 to 2004, when race was not a factor in admissions, an average of 15.2% of the non-Top Ten Texas enrollees each year were African-American or Hispanic. In 2008, 17.9% of the non-Top Ten Texas enrollees were African-American or Hispanic. Even if this percentage increase were entirely attributable to UT's consideration of race rather than changing demographics of the applicant pool or other AI and PAI factors, UT's consideration of race would have been decisive for only 33 African-American and Hispanic students combined. That represented approximately 0.5% of the 6,322 in-state students enrolled in UT's 2008 freshman class, and a far lower percentage of the tens of thousands of in-state applicants that year, all of whom were classified by race.

The post-discovery summary judgment record does not include any data showing the background or individual characteristics of minorities admitted because of the Top 10% Law or through AI/PAI review. It does show, however, that "underrepresented" minority enrollment under the Top 10% Law continued to increase through 2008, allowing UT to enroll a 2008 in-state class that was 25.5% African American and Hispanic. App. 19a.

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this litigation's pendency, the Texas Legislature amended the Top 10% Law to limit the number of applicants admitted through this path at 75% of UT's overall freshman class. *See* Tex. Educ. Code § 51.803(a-1). Under this amendment, the 75% cap will be lifted if a court ruling prohibits UT from using race as a factor in undergraduate admissions. *See id.* § 51.803(k)(1).

B. Procedural History And This Court's Ruling

Petitioner filed this suit under the Equal Protection Clause and 42 U.S.C. § 1983 after she was denied admission to the entering class of 2008. App. 2a-3a. UT defended its system as equivalent to the system affirmed in *Grutter* and relied on its Proposal to argue that its efforts to increase minority enrollment properly pursued a compelling educational interest in reducing demographic disparities and increasing diversity in small classrooms. App. 290a-294a. The district court agreed, found UT's use of race consistent with *Grutter*, and granted summary judgment to UT. App. 315a.

The Fifth Circuit affirmed, holding that UT was "due deference" on its good-faith judgment that race-based policies were necessary to increase minority enrollment because of the demographic and classroom diversity issues and finding that UT's use of race was narrowly tailored because it resembled the system approved in *Grutter*. App. 147a-260a. Judge King concurred to emphasize that no party to the litigation had challenged "the validity or the wisdom of the Top Ten Percent Law." App. 218a. Judge Garza specially concurred, regretfully agreeing that *Grutter* required deference to UT. App. 218a-260a. Absent deference, Judge Garza saw no constitutional justification for UT's program, which classified every applicant by race yet "had an infinitesimal impact on critical mass in the student body as a whole." App. 253a.

The Fifth Circuit denied rehearing en banc. App. 318a-330a. In dissent, then-Chief Judge Jones objected to the deferential review provided by the panel and concluded that UT's system could not be sustained under traditional

strict scrutiny. App. 320a-330a. She found that UT's use of racial preferences was "gratuitous" as they produced a "tiny" increase in minority admissions. App. 328a. Judge Jones further concluded that UT's classroom diversity rationale was "without legal foundation, misguided and pernicious to the goal of eventually ending racially conscious programs." App. 330a.

This Court granted certiorari. In its merits brief and at oral argument, UT abandoned its demographic and classroom diversity interests in favor of an entirely new interest in "diversity within racial groups." Br. of Respondents 33, *Fisher v. Univ. of Texas at Austin*, No. 11-345 (Aug. 6, 2012) ("Resp. Br.").[4] Instead of arguing (as it had previously) that UT needed to use racial preferences to increase minority enrollment, UT argued that it needed racial preferences so that it could enroll minorities with the characteristics it prefers. *Id.* at 33-34. For example, UT argued that racial preferences would allow it to enroll minority students from "integrated high school[s]" and more affluent socio-economic backgrounds over those who are the "first in their families to attend college." *Id.* Doing so, UT claimed, would "dispel stereotypical assumptions" instead of "reinforc[ing]" them. *Id.* at 34.

This Court vacated the Fifth Circuit's deferential decision and remanded the case for review of the summary

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4. Regarding demographics, UT took the position that it "does not use its admissions process to work backwards toward any demographic target—or, indeed, any target at all." Resp. Br. 20; *id.* at 28-29. Regarding classroom diversity, UT claimed to have "never asserted a compelling interest in any specific diversity in every single classroom." Oral Arg. Tr. 34:20-22; *see also* Resp. Br. 39 ("UT's objective was far broader than the interest in 'classroom diversity' attacked by petitioner.").

judgment record under traditional strict scrutiny to determine "whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity." App. 114a. The Court emphasized that the review on remand must look to "th[e] record—and not 'simple ... assurances of good intention.'" *Id.* (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989)). This is because "[s]trict scrutiny is a searching examination, and it is [UT] that bears the burden to prove 'that the reasons for any racial classification are clearly identified and unquestionably legitimate.'" App. 108a (quoting *Croson*, 488 U.S. at 505).

The Court restated the steps required by strict scrutiny review under prevailing case law. App. 108a-109a. In so doing, the Court emphasized that "[s]trict scrutiny requires the university to demonstrate with clarity that its 'purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary ... to the accomplishment of [that] purpose.'" App. 107a (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978)). The only academic judgment to which a court may defer is "that a diverse student body would serve its educational goals." App. 110a. Even then, deference is not unlimited; "[a] university is not permitted to define diversity as some specified percentage of a particular group merely because of its race or ethnic origin .... That would amount to outright racial balancing, which is patently unconstitutional." *Id.* (quotations and citations omitted).

C. Proceedings On Remand

On remand, the Fifth Circuit again affirmed the grant of summary judgment to UT, this time relying on UT's newfound interest in enrolling a sufficient number of minorities from "integrated" high schools with more favorable socio-economic backgrounds. App. 31a-40a.[5] The Fifth Circuit found that UT's new approach "is not a further search for numbers but a search for students of unique talents and backgrounds." App. 40a. UT disclaimed the interest in seeking the demographic parity and classroom diversity it had relied on in its Proposal and through the initial round of litigation. Indeed, UT went so far as to tell the Fifth Circuit that the "objectives" of "demographic parity" and "classroom diversity" had been "concocted by Fisher." Supplemental Brief for Appellees 39, *Fisher v. University of Texas at Austin*, No. 09-50822 (5th Cir. Oct. 25, 2013).

The Fifth Circuit found that racial preferences were constitutionally justified by UT's claimed need to enroll under-represented minority students from majority-white high schools who, among other things, have "demonstrated qualities of leadership and sense of self" that were purportedly lacking in the minority students admitted pursuant to the Top 10% Law. App. 39a. Yet the record contained no evidence or evaluation of the background of students admitted under the Top 10% Law capable of supporting this finding. The Fifth Circuit just speculated

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5. On remand, UT raised the same standing argument it had raised before this Court. Resp. Br. 16-17 n.6. The majority held the argument was foreclosed by the mandate rule. App. 8a-10a. Judge Garza rejected the standing argument on the merits. App. 58a-61a.

based on SAT averages and its own demographic research that students admitted under the Top 10% Law do not have the "unique talents and higher test scores," App. 48a, required to "enrich the diversity of the student body," App. 40a, because their admission is "measured solely by class rank in largely segregated schools," App. 49a, that do not offer "the quality of education available to students at integrated high schools," App. 35a. The Fifth Circuit further held that UT's system is narrowly tailored because it does not operate as a quota, affects few admissions decisions, and furthers an interest that cannot be satisfied through the race-neutral Top 10% Law, which depends "upon segregated schools to produce minority enrollment." App. 51a.

Judge Garza dissented. App. 57a-90a. In his view, the Fifth Circuit had again "defer[red] impermissibly to [UT's] claims" and, absent deference, UT could not prevail. App. 57a. Judge Garza specifically rejected UT's new claim that racial preferences are required to "promot[e] the *quality* of minority enrollment—in short, diversity within diversity" by identifying "the most 'talented, academically promising, and well-rounded' minority students." App. 73a.

First, Judge Garza found that UT did not establish that such an interest is compelling. The "stated ends are too imprecise to permit the requisite strict scrutiny analysis," App. 74a, because there is no way for a court "to determine when, if ever, [this] goal (which remains undefined) for qualitative diversity will be reached," App. 78a.

Second, Judge Garza chastised the majority for failing to require evidence from UT that racial preferences are needed to further it, even if the interest were cognizable. UT did not investigate, evaluate, or "assess whether Top Ten Percent Law admittees exhibit sufficient diversity within diversity" before "deploying racial classifications to fill the remaining seats." App. 74a. Instead, UT created a litigation position that requires the court "to *assume* that minorities admitted under the Top Ten Percent Law ... are somehow more homogenous, less dynamic, and more undesirably stereotypical than those admitted under holistic review." App. 75a. That assumption alone is "alarming" as it "embrace[s] the very ill that the Equal Protection Clause seeks to banish" by stereotyping students solely because they reside in "majority-minority communities." App. 76a. It also is unsupported by any "evidence in the record," which strict scrutiny requires. App. 75a.

The Fifth Circuit denied rehearing en banc by a vote of 10-5. App. 95a. Joined by four dissenting judges, Judge Garza reiterated the objections to UT's program that he detailed in his panel dissent. *Id.*

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the Fifth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court." SUP. CT. R. 10(c). This Court acknowledged the case's importance when it granted review the first time. The case has only gained importance since then, as the Fifth Circuit's decision on remand overrides this Court's *Fisher I* mandate and strict scrutiny precedent by endorsing an

essentially unreviewable post hoc "qualitative" diversity rationale that is premised on the very racial stereotypes that the Equal Protection Clause banished. The Court should grant the petition and reverse the Fifth Circuit's judgment.

I. The Court Should Grant Certiorari Because The Fifth Circuit Did Not Follow Its Instruction To Apply Strict Scrutiny On Remand.

This Court's decision in *Fisher I* could not have been more clear. On remand, the Fifth Circuit was to review the record under the traditional and demanding constraints of strict scrutiny. App. 114a-115a. The Court reiterated the ground rules of strict scrutiny at length and in painstaking detail. App. 108a-112a. And the Court emphasized that "[s]trict scrutiny must not be strict in theory but feeble in fact." App. 115a. The Fifth Circuit did not follow the Court's instructions.

This Court explicitly instructed the Fifth Circuit to conduct strict-scrutiny review without deferring to UT. App. 110a-111a. "Strict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice." App. 113a. As Judge Garza thoroughly explained, however, deference pervades the remand opinion. App. 57a, 68a, 89a, 90a (Garza, J., dissenting). Shifting from rational-basis terminology to the rhetoric of strict scrutiny is not enough to satisfy *Fisher I* or any other strict-scrutiny precedent from this Court. The reviewing "court's actual analysis must demonstrate that 'no deference' has been afforded." App. 68a (Garza, J., dissenting).

There can be no question that the Fifth Circuit's decision "is squarely at odds with the central lesson of *Fisher*." App. 57a (Garza, J., dissenting). At every turn, the majority was "persuaded" by UT's circular legal arguments, post hoc rationalizations for its decision to reintroduce racial preferences, and unsupported factual assertions. *See infra* at 17-18. "[T]his Court has a special interest in ensuring that courts on remand follow the letter and spirit of [its] mandates[.]" *Planned Parenthood of Se. Pa. v. Casey*, 510 U.S. 1309, 1311 (1994) (Souter, J.) (citing *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255-56 (1895)). That institutional interest is triggered here as the Fifth Circuit applied strict scrutiny in name only.

More specifically, this Court directed the Fifth Circuit to seek "additional guidance ... in the Court's broader equal protection jurisprudence" as "[t]he higher education dynamic does not change the narrow tailoring analysis of strict scrutiny applicable in other contexts." App. 113a-114a (citing precedent including *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), *Croson*, 488 U.S. 469, and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986)). But not only are those decisions "entirely absent" from the opinion, App. 70a (Garza, J., dissenting), the Fifth Circuit contravened them in multiple ways. Instead of forcing UT to defend its use of racial preferences under the heavy burden of strict scrutiny, the Fifth Circuit once again allowed UT to make the kind of arguments only available in rational-basis review.

First, strict scrutiny demands that UT's "justification" for reintroducing racial preferences in 2004 and for using race to Ms. Fisher's detriment in 2008 be "genuine, not hypothesized or invented post hoc in response to

litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996); *see also Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996) ("[T]he State must show that the alleged objective was the legislature's 'actual purpose' for the discriminatory classification.") (citation omitted). Under rational-basis review, by contrast, it is "constitutionally irrelevant [what] reasoning in fact underlay the ... decision." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (citation and quotations omitted).

The Fifth Circuit did not hold UT to the Proposal's demographic parity and classroom diversity justifications; it permitted UT to replace them with the "qualitative" rationale raised for the first time on appeal. It is clear why UT, facing strict scrutiny for the first time, would have abandoned the actual reasons for its decision to reintroduce racial preferences. App. 320a-330a (Jones, J., dissenting from the denial of rehearing en banc); App. 218a-260a (Garza, specially concurring); App. 78a-81a (Garza, J., dissenting). That the handwriting was on the wall, however, neither licensed UT to defend its program on a post hoc rationale nor empowered the Fifth Circuit to countenance that prohibited tactic. UT's decision to rely exclusively on a rationale that was invented years after Ms. Fisher applied and was rejected from UT alone should have resulted in judgment in her favor. The Fifth Circuit's contrary approach violated the established rules of strict scrutiny.

Second, strict scrutiny required the Fifth Circuit to ensure that UT "at the time it acted had a strong basis in evidence to support [its] conclusion" that the use of race was necessary to achieve its asserted goal of "qualitative" diversity. *Shaw*, 517 U.S. at 915. This Court

thus instructed the Fifth Circuit to "assess whether [UT] has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity." App. 114a. If rational-basis review applied, by contrast, UT would have been under "no obligation to produce evidence to sustain [the] rationality" of the classification as the "burden is on the one attacking [it] to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Heller v. Doe*, 509 U.S. 312, 320-21 (1993).

Not surprisingly, UT could point to *no* record evidence, let alone strong evidence, to substantiate its asserted unmet need for "qualitative" diversity that was invented when the case was on appeal. The studies underlying the Proposal tried to examine whether UT was failing to meet its demographic and classroom diversity goals; no study attempted to measure whether UT was failing to meet an interest in "qualitative" diversity. Nor did UT produce such evidence during discovery or submit any other contemporaneous evidence to substantiate this interest during the summary judgment proceedings. Accordingly, even setting aside the fact that the "qualitative" diversity interest is an improper post hoc rationale, the lack of any record evidence showing the need to advance it by racial preferences also should have meant judgment in Ms. Fisher's favor.

Refusing to strike down UT's use of race in 2008 for lack of record evidence, the Fifth Circuit "venture[d] far beyond the summary judgment record," App. 75a n.15 (Garza, J., dissenting), and conducted its own research in an attempt to engineer a factual basis for UT's "qualitative" diversity goal, *see* App. 23a-24a n.70, App.

25a-26a n.73, App. 32a-33a nn. 97-98, App. 34a-38a nn. 101, 103-120, App. 43a nn. 123-26. But not only was the appellate factfinding fruitless, *see infra* at 21-25, it violated the Court's instructions, which directed the Fifth Circuit to "assess whether *the University has offered* sufficient evidence" to sustain the admissions program on remand, App. 114a (emphasis added); *see also id.* (directing the Court of Appeals to review "this record").[6] UT had every opportunity to develop the record. The appeal needed to be decided based only upon that evidence. *CLS v. Martinez*, 561 U.S. 661, 676-78 (2010). That record did not contain any constitutionally acceptable rationale for the use of racial preferences in 2008 or any evidence substantiating the need to use race in pursuit of a post hoc "qualitative" diversity rationale. The Fifth Circuit thus failed to fulfill its responsibility to strictly scrutinize UT's program in this respect as well.

At base, the Fifth Circuit's failure to follow this Court's instruction to apply strict scrutiny on remand strikes a blow at the heart of the Fourteenth Amendment. As the Court has explained many times, "because racial characteristics so seldom provide a relevant basis for disparate treatment, the Equal Protection Clause demands that racial classifications be subjected to the

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6. The Fifth Circuit's factfinding expedition also violated basic rules of appellate procedure. "[F]actfinding is the basic responsibility of the district courts, rather than the appellate courts." *Maine v. Taylor*, 477 U.S. 131, 144-45 (1986). On summary judgment, therefore, the court of appeals "can consider only those papers that were before the trial court." 10A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE, §2716 (3d ed. 1998); *see also Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986).

most rigid scrutiny." App. 108a (citations, quotations, and alterations omitted). The Court should grant review to ensure that this important promise is kept.

II. The Court Should Grant Certiorari Because UT's Newly Minted "Qualitative" Diversity Rationale Cannot Survive Strict Scrutiny.

The Court should review this case for an additional important reason: the Fifth Circuit's decision accepted a novel "qualitative" diversity interest that cannot withstand rigorous judicial review and is not the educational interest in enrolling a "critical mass" of minority students that *Grutter* found compelling.

A. UT's "Qualitative" Interest Is Not Clear, Legitimate, Or Narrowly Tailored.

The Fifth Circuit's failure to follow the ground rules for strict scrutiny enabled it to endorse a novel "qualitative" diversity interest that foreclosed rigorous judicial review. UT should have borne the "burden to prove that the reasons for any racial classification are clearly identified and unquestionably legitimate." App. 108a (quotations and alterations omitted). Had the Fifth Circuit followed that instruction it would have discovered that UT's "qualitative" diversity rationale is neither.

A "qualitative" diversity interest is not a "clearly identified" educational goal that allows a court to determine whether "the means chosen by the University to attain diversity are narrowly tailored to that goal." App. 110a. UT "has not provided any concrete targets for admitting more minority students possessing these

unique qualitative-diversity characteristics—that is, the 'other types of diversity' beyond race alone." App. 74a (Garza, J., dissenting). Nor has it defined "[a]t what point ... this qualitative diversity target [would] be achieved." *Id.* Indeed, UT "offers no method for this court to determine when, if ever, its goal (which remains undefined) for qualitative diversity will ever be reached." App. 78a (Garza, J., dissenting). As Judge Garza put it, UT's "qualitative" diversity interest is just "too imprecise to permit the requisite strict scrutiny analysis." App. 74a.

The Fifth Circuit failed in its attempt to help UT define what its interest actually is and when it would be achieved. The majority disclaimed any quantitative evaluation of the interest because, in its view, UT's interest is "*not* a further search for numbers but a search for students of unique talents and backgrounds." App. 40a (emphasis added). Yet the majority found racial preferences necessary because "numbers" while "not controlling" are "relevant," and "minority representation ... remained largely stagnant ... rather than moving towards a critical mass of minority students." App. 48a, 30a. The majority never was able to explain precisely why enrollment numbers have constitutional relevance to a qualitative interest that is "not a further search for numbers" and has "no fixed upper bound" or "minimum threshold." App. 46a. As a consequence, the majority did not (and could not) offer a cogent response to Judge Garza's charge that the "qualitative" diversity interest has no termination point because it is in the subjective control of University administrators.

Fisher I did not demand "clarity" from UT for form's sake. App. 107a. Clarity of purpose "ensures that the means

chosen 'fit' [the] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson*, 488 U.S. at 493. Accepting UT's amorphous, unbounded, and subjective "qualitative" interest as compelling would amount to the very same deference to UT's use of racial preferences the Fifth Circuit first accorded and this Court rejected. If UT is permitted to determine for itself when its "qualitative" admissions goals are met, there will be no way to "'smoke out'" whether this program is "illegitimate." *Adarand*, 515 U.S. at 226. UT instead will have the absolute discretion to use race for as long as it wishes. Any resemblance between strict scrutiny and such a legal regime is purely coincidental.

Rigorous judicial review would have revealed that UT's "qualitative" diversity interest is in fact illegitimate. It depends on an assumption that, as a group, minorities admitted through the Top 10% Law "are inherently limited in their ability to contribute to the University's vision of a diverse student body," App. 75a, merely because many come from "'majority-minority communities,'" App. 77a (Garza, J., dissenting). That rank stereotyping is the "very ill that the Equal Protection Clause seeks to banish." App. 76a (Garza, J., dissenting). Just as "[i]t cannot be entertained as a serious proposition that all individuals of the same race think alike," *Schuette v. BAMN*, 134 S. Ct. 1623, 1634 (2014), it cannot be assumed that all minorities admitted via the Top 10% Law uniformly lack the "unique talents and backgrounds" UT claims to value, App. 40a. UT may be willing to conclude that this entire body of minority students lacks a "skill set" UT needs in order to achieve some version of diversity based on nothing more than minor differences in average SAT scores and

the fact that many did not matriculate from "majority white" high schools. App. 53a. But the Equal Protection Clause does not allow UT to "substitute racial stereotype for evidence, and racial prejudice for reason." *Calhoun v. United States*, 133 S. Ct. 1136, 1137 (2013) (Sotomayor, J., respecting denial of certiorari).

Even assuming UT's qualitative diversity goal were legitimate, which it is not, UT still could not meet its narrow-tailoring burden. Strict scrutiny requires that UT show that its interest in "qualitative" diversity cannot be satisfied through race-neutral means. *See* App. 111a-112a ("The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity."). Here, then, UT must show that the "qualitative" characteristics it seeks are uniquely present among minority applicants that receive racial preferences and gain admission through the "holistic" AI/PAI process because of them. Yet nothing in the record shows that "qualitative diversity is absent among the minority students admitted" through the operation of the race-neutral Top 10% Law. App. 74a (Garza, J., dissenting). Nor does the record even show "that any minority students admitted under holistic review come from majority-white schools" where UT claims the needed characteristics are developed. App. 77a n.17 (Garza, J., dissenting). An array of unproven and counter-intuitive assumptions cannot satisfy UT's narrow tailoring burden.

Indeed, UT does not even "evaluate the diversity present in [the Top 10% Law] group before deploying racial classifications to fill the remaining seats." App. 74a (Garza, J., dissenting). That is, UT "does not assess"

whether Top 10% Law "admittees exhibit sufficient diversity within diversity, whether the requisite 'change agents' are among them, and whether these admittees are able, collectively or individually, to combat pernicious stereotypes." *Id.* UT instead asks the Court "to *assume* that minorities admitted under the" Top 10% Law "are somehow more homogenous, less dynamic, and more undesirably stereotypical than those admitted under holistic review." App. 75a (Garza, J., dissenting). But because UT "offers no evidence in the record to prove this," and because the assumption is itself noxious, the Court "must therefore refuse to make this assumption." *Id.* In short, UT has utterly failed to substantiate the necessity of using racial preferences to achieve "qualitative" diversity.

The Fifth Circuit's own factfinding fares no better. It compiled aggregate data about Texas high school districts, which shows only that certain Texas school "districts serve majority-minority communities." App. 77a (Garza, J., dissenting). It did not attempt to identify students from those districts that enrolled at UT or consider their individual characteristics. Instead, the Fifth Circuit simply confirmed that majority-minority communities exist, and then accepted UT's "standing presumption that minority students admitted [from them] under the Top Ten Percent Law do not possess the characteristics necessary to achieve a campus environment defined by 'qualitative diversity.'" *Id.*

The Equal Protection Clause forbids courts, no less than litigants, from relying on "overbroad generalizations about the different talents, capacities, or preferences" of minority children based solely on the racial makeup of their community and average SAT scores. *Virginia*,

518 U.S. at 533. Such generalizations are not a substitute for "persuasive evidence" that racial preferences are necessary to achieve diversity. *Id.* at 539. By accepting UT's decision to view minority students admitted via the Top 10% Law this way, "the majority engages in the very stereotyping that the Equal Protection Clause abhors." App. 77a (Garza, J., dissenting).

UT's use of racial preferences also fails the Court's narrow tailoring requirement because UT's own AI/PAI system is at war with this alleged interest in "qualitative" diversity. UT claims to need racial preferences in order to enroll more minority applicants from "high-performing" majority-majority high schools. Resp. Br. 33-34; App. 31a-32a & nn.96-97. Yet UT has incorporated racial preferences into an AI/PAI scoring system that makes it more difficult for such students to secure admission. The PAI gives a significant race-neutral preference to socio-economically disadvantaged students that tend to come from majority-minority high schools. *See supra* at 4. Furthermore, UT's outreach and scholarship programs target "predominantly low-income student populations." App. 26a. UT cannot seriously claim that it needs to use racial preferences to enroll a cohort of applicants it has chosen to handicap in the application process.[7]

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7. UT also has argued that using race in holistic admissions "giv[es] high scoring minority students a better chance of gaining admission to [UT's] competitive academic departments" than does the Top 10% Law. App. 49a. But the record evidence shows that, from 2005 to 2007, "underrepresented" minorities admitted via the Top 10% Law were accepted into the most competitive programs at substantially higher rates than minority students admitted through the holistic admissions process. In fact, no African American admitted holistically was accepted into UT's highly

UT's AI/PAI system therefore does not even remotely advance its claimed interest. If UT wished to enroll more minority students from affluent communities, it could have eliminated from the PAI calculation the socio-economic and other preferences that operate to their disadvantage. UT also could have awarded a preference to students from high-performing schools or made the AI scoring (which takes SAT performance into account) a greater factor in admissions decisions. Any or all of these race-neutral policies could have increased the admission chances of affluent minority applicants as much or more than layering racial preferences on top of UT's preexisting AI/PAI system. Strict scrutiny imposes on UT "the ultimate burden of demonstrating, *before turning to racial classifications*, that available, workable race-neutral alternatives do not suffice." App. 112a (emphasis added). UT has not met that burden.

B. UT's "Qualitative" Interest Is Not A Last Resort Necessary To Achieve An Educational Goal That This Court Has Found Compelling.

As explained above, UT's "qualitative" diversity goal fails strict scrutiny on its own terms. But this post hoc goal suffers from an even more fundamental defect: it is not narrowly tailored to achieve any educational interest this Court has found compelling. It certainly has nothing to do with the "critical mass" interest found compelling in *Grutter*. As this Court has explained, "critical mass means

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competitive Business, Communications, or Nursing programs from 2005 to 2007. At the same time, nearly half of all African Americans admitted via holistic review were cascaded into Liberal Arts. It is UT's race-based holistic admissions—not the Top 10% Law—that has "clustering tendencies." *Cf.* App. 50a.

numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race." *Grutter*, 539 U.S. at 319. Having abandoned the classroom diversity study UT previously touted as showing that this interest had not been satisfied, there is no longer any argument that minorities studying at UT suffer from racial isolation on campus or feel like spokespersons for their race in the classroom or anyplace else.[8]

As a consequence, UT cannot offer any rationale for why *Grutter* would permit it to layer a system of racial preferences that "admits only a small number of minority students under race-conscious holistic review," App. 71a (Garza, J., dissenting), on top of "a race-neutral policy [that] has resulted in over one-fifth of [UT] entrants being African-American or Hispanic," App. 328a (Jones, J., dissenting from denial of rehearing en banc). As Judge Garza explained, UT "fails to explain *how* this small group contributes to its 'critical mass' objective." App. 72a. There is simply no defense under *Grutter* for a race-

8. It is impossible to square UT's use of racial preferences to enroll more affluent minorities with *Grutter* for an additional reason. *Grutter* claims to look to racial diversity as a means of educating the entire student body by bringing to bear diverse life experiences, socio-economic backgrounds, and differing points of view. *See Grutter*, 539 U.S. at 330. UT's newfound qualitative interest, in contrast, is premised on the alleged need to pursue those minorities with backgrounds and experiences least divergent from those of non-minority students. UT has made no showing that less diverse socio-economic backgrounds produce more potentially enriching differences in perspective. In fact, UT adversely stereotypes minority applicants from majority-minority communities who may well have more ability to break down misperceptions than those generated from the pool of preferred minority candidates that UT claims to be pursuing.

based admissions system that labels every applicant by race and yet has only "an infinitesimal impact on critical mass in the student body as a whole." App. 45a (Jones, J., dissenting from denial of rehearing en banc) (citing *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 734-35 (2007)).

Indeed, the Fifth Circuit barely attempts to defend the "qualitative" diversity interest under *Grutter*; and the opinion does not grapple at all with *Parents Involved*. The majority instead claims that this "qualitative" interest follows directly from Judge Powell's opinion in *Bakke*. *See* 438 U.S. at 269-324. In its view, an admissions program using racial preferences to make a "contribution to the richness of diversity as envisioned by *Bakke*" will never make a large contribution to minority enrollment. App. 45a. But the majority ignored that UT does not employ racial preferences in the manner *Bakke* envisioned.

Justice Powell's *Bakke* opinion suggested that the use of race to make comparative decisions between qualified applicants when there were "a few places left to fill" in an entering class could be constitutionally justified to advance educational diversity. *Bakke*, 438 U.S. at 324 (Appendix to opinion of Powell, J.). But *Bakke* never contemplated the wholesale use of race in the scoring of all applicants. *Bakke* assumed an individualized marginal admissions process with head-to-head applicant comparison rather than a scoring system where race is a universal factor. At most, *Bakke* might have applied were UT to have used a system where a pool of applicants for a limited number of places was individually evaluated and race was employed as a tie breaker based on a demonstrated gap in the diversity of those admitted on a race-neutral basis. *See Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting)

But UT did not choose that path. The undisputed record shows that each applicant file considered by UT is branded with race on its cover, that each applicant receives a PAI score in which race counts, and that the eligibility of applicants for specific schools and majors is dependent on an AI/PAI matrix. App. 102a-103a. Having chosen to *label* each and every applicant by race, UT was obligated to prove that the educational benefit of that system "outweigh[s] the cost of subjecting" approximately 30,000 applicants annually "to disparate treatment based solely upon the color of their skin." *Parents Involved*, 551 U.S. at 734. As in *Parents Involved*, then, "the minimal impact" of UT's "racial classifications on school enrollment casts doubt on the necessity of using racial classifications." *Id.* at 790 (Kennedy, J., concurring in part and in the judgment). Using racial preferences, which should be a "last resort," *id.*, is inherently suspect when "[t]he additional diversity contribution of [UT's] race-conscious admissions program is tiny, and far from 'indispensable,'" App. 328a (Jones, J., dissenting from denial of rehearing en banc).

The Fifth Circuit also suggested that the contribution of racial preferences was tiny only because the AI/PAI system applied to 20 percent of total admissions in 2008 and would have made a greater numerical contribution if AI/PAI applied to the 80 percent of admissions generated by the Top 10% Law. App. 22a-25a. But UT, of course, did not "choose" to limit AI/PAI admissions to this small fragment of the entering class. That limitation was in place because the Texas Legislature passed the Top 10% Law, which preceded UT's hasty decision to reintroduce racial preferences on the same day this Court announced its decision in *Grutter*. *See supra* at 5.

The Fifth Circuit's opinion is pervaded by its distaste for the Top 10% Law, which in its view restricted UT's ability to be an academically elite institution. In fact, the Court went so far as to suggest that UT might elect to use "*Grutter*'s holistic review to select 80% or all of its students" if it is not permitted to retain its current system of racial preferences. App. 22a. But the Top 10% Law is unchallenged here, App. 87a-88a (Garza, J., dissenting); App. 218a (King, J., specially concurring), and is an unquestionably legitimate enactment by the Texas Legislature, *Schuette*, 134 S. Ct. at 1638. It was not the role of the Fifth Circuit to judge that law's educational merit. The court's distaste for the Top 10% Law provided no basis for ignoring the critical mass of minority students it inevitably generated.

III. Review Is Essential To Permit Strict Scrutiny To Play Its Intended Role In Ensuring That Racial Preferences Do Not Trample The Right To Equal Protection.

The Fifth Circuit's refusal to honor this Court's clear instruction to apply strict scrutiny to the record is reason enough to grant the Petition. But much more is at stake here. Allowing a decision on remand to stand that endorses a noxious "qualitative" diversity interest raised for the first time on appeal and which is devoid of any record support will have ramifications far beyond this case.

There have always been those within the Court that have correctly believed that any use of racial classification outside the remedial setting conflicts with the Fourteenth Amendment's text and history. *Plessy v. Ferguson*, 163

U.S. 537, 552-62 (1896) (Harlan, J., dissenting); *Croson*, 488 U.S. at 520-28 (Scalia, J., concurring in the judgment); *Grutter*, 539 U.S. at 350-74 (Thomas, J., concurring in part and dissenting in part). "The moral imperative of racial neutrality is the driving force of the Equal Protection clause." *Croson*, 488 U.S. at 518 (Kennedy, J. concurring in part and in the judgment). Eliminating racial preferences in education altogether would honor "important structural goals" by eliminating "the necessity for courts to pass upon each racial preference that is enacted." *Id.*

To date, the Court has declined to act on this view of the Equal Protection Clause on the understanding that "in application, the strict scrutiny standard [would] operate in a manner generally consistent with the imperative of race neutrality, because it forbids the use even of narrowly drawn racial classifications except as a last resort." *Id.* at 519. But if "strict scrutiny is abandoned or manipulated to distort its real and accepted meaning, the Court lacks authority to approve the use of race even in this modest limited way." *Grutter*, 539 U.S. at 387 (Kennedy, J. dissenting). When the Court "does not apply strict scrutiny ... it undermines both the test and its own controlling precedents." *Id.* If *Fisher I* permits UT to prevail here, the Court will need to rethink its endorsement of *Grutter*'s diversity interest given the diminished force of "*stare decisis* when fundamental points of doctrine are at stake." *Parents Involved*, 551 U.S. at 792 (Kennedy, J., concurring in part and concurring in the judgment). Put plainly, the promise of strict scrutiny is illusory if UT can invent a "qualitative" diversity rationale for its program on appeal and then successfully defend that unfortunate rationale without any supporting record evidence.

The inference universities will draw from the Fifth Circuit's decision is inescapable. This Court's promise of non-deferential strict scrutiny in *Fisher I* will be viewed as purely rhetorical. By invoking a "qualitative" diversity rationale, any university could evade strict-scrutiny review regardless of the level and educational contribution of minorities admitted through race-neutral means. By avoiding express quotas or defined point awards and using race in a multi-factor admissions calculus, a university could claim to satisfy narrow tailoring. The university then might assume that using race to produce an overall increase in minority admissions, however tiny, will somehow advance its qualitative goal. In sum, leaving the Fifth Circuit's decision unreviewed will render strict scrutiny a *pro forma* exercise. Qualitative diversity can mean whatever a university wants it to mean and can be unsatisfied for however long a university wants it to be unsatisfied. It is a recipe for endless racial preferences.

The proliferation of the "qualitative" diversity interest advanced by universal racial preferences thus will only heighten the concern that "each applicant" is not being "evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." App. 107a (citation and quotations omitted). UT's stated use of racial preferences in order to admit the hypothetical "African American or Hispanic child of successful professionals in Dallas" in place of Ms. Fisher, Resp. Br. 34, demonstrates that race, and race alone, is determinative when "qualitative" diversity is the goal. If that hypothetical student and Abigail Fisher come from similar family backgrounds, share the same socio-economic status, and are comparably educated through high school, they should compete equally for admission

and race should be no factor. Preferring one to the other, as UT does, therefore cannot be about enrolling students from "the greatest possible variety of backgrounds." *Grutter*, 539 U.S. at 330. So although UT may claim that it is genuinely interested in "qualitative" diversity, the answer to Justice Kennedy's question at oral argument in *Fisher I*: "So what you're saying is that what counts is race above all?," Oral Arg. Tr. 45:3-4, is of course "yes."

In *Schuette*, the Court sought to encourage a "national dialogue regarding the wisdom and practicality of race-conscious admissions policies in higher education." 134 S. Ct. at 1631. That important conversation can occur only if universities believe that use of racial preferences will be subject to strict scrutiny. Experience sadly teaches that only "[c]onstant and rigorous judicial review" will "force educational institutions to seriously explore race-neutral alternatives [that are] ... more effective in bringing about the harmony and mutual respect among all citizens that our constitutional tradition has always sought." *Grutter*, 539 U.S. at 393-95 (Kennedy, J., dissenting). Universities will view a decision leaving the Fifth Circuit's judgment undisturbed as "a green light" to use racial preferences unencumbered by meaningful judicial oversight. App. 321a (Jones, J., dissenting from the denial of rehearing en banc). And they will have absolutely no "incentive to make the existing minority admissions schemes transparent and protective of individual review." *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting).

By granting certiorari in this case and reinforcing the limiting constitutional boundaries of strict scrutiny, the Court will foster that dialogue and put an end to the

masking of general social justice concerns as compelling educational interests. "Prospective students, the courts, and the public" must be able to "demand that [universities] prove their process is fair and constitutional in every phase of implementation." *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting). Unless the Court is able to enforce this commitment, "[s]tructural protections may be necessities if moral imperatives are to be obeyed." *Croson*, 458 U.S. at 518 (Kennedy, J., concurring in part and concurring in the judgment).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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Date: February 10, 2015

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, DATED JULY 15, 2014

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-50822

ABIGAIL NOEL FISHER,

Plaintiff-Appellant

v.

UNIVERSITY OF TEXAS AT AUSTIN; DAVID B. PRYOR, Executive Vice Chancellor for Academic Affairs in His Official Capacity; WILLIAM POWERS, JR., President of the University of Texas at Austin in His Official Capacity; BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM; R. STEVEN HICKS, as Member of the Board of Regents in His Official Capacity; WILLIAM EUGENE POWELL, as Member of the Board of Regents in His Official Capacity; JAMES R. HUFFINES, as Member of the Board of Regents in His Official Capacity; JANIECE LONGORIA, as Member of the Board of Regents in Her Official Capacity; COLLEEN MCHUGH, as Member of the Board of Regents in Her Official Capacity; ROBERT L. STILLWELL, as Member of the Board of Regents in His Official Capacity; JAMES D. DANNENBAUM, as Member of the Board of Regents in His Official Capacity; PAUL FOSTER, as Member of the Board of Regents in His Official Capacity;

Appendix A

PRINTICE L. GARY, as Member of the Board of Regents in His Official Capacity; KEDRA ISHOP, Vice Provost and Director of Undergraduate Admissions in Her Official Capacity; FRANCISCO G. CIGARROA, M.D., Interim Chancellor of the University of Texas System in His Official Capacity,

Defendants-Appellees

Appeal from the United States District Court
for the Western District of Texas

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES

Before KING, HIGGINBOTHAM, and GARZA, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Abigail Fisher brought this action against the University of Texas at Austin,[1] alleging that the University's race-conscious admissions program violated the Fourteenth Amendment. The district court granted summary judgment to UT Austin and we affirmed. The Supreme Court vacated and remanded, holding that this Court and the district court reviewed UT Austin's means to the end of a diverse student body with undue

1. Along with Fisher, Rachel Michalewicz was originally a plaintiff against UT Austin; Michalewicz is no longer a party to this action.

deference; that we must give a more exacting scrutiny to UT Austin's efforts to achieve diversity. With the benefit of additional briefing, oral argument, and the ordered exacting scrutiny, we affirm the district court's grant of summary judgment.

I

A

Fisher applied to UT Austin for admission to the entering class of fall 2008.[2] Although a Texas resident, she did not graduate in the top ten percent of her class. She therefore did not qualify for automatic admission under the Top Ten Percent Plan, which that year took 81% of the seats available for Texas residents.[3] Instead, she was considered under the holistic review program,[4] which looks

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2. Defs.' Cross-Mot. Summ. J., Ex. Tab 7 to App., Ishop Aff. at ¶ 2, *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587 (W.D. Tex. 2009) (No. 08-263), ECF No. 96 [hereinafter Ishop Aff.].

3. Office of Admissions, Univ. of Tex. at Austin, *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin: Demographic Analysis of Entering Freshmen Fall 2008 and Academic Performance of Top 10% and Non-Top 10% Students Academic Years 2003-2007 (Report 11)*, at 7 tbl.1a (Oct. 28, 2008) [hereinafter *2008 Top Ten Percent Report*], Defs.' Cross-Mot. Summ. J., Ex. Tab 8 to App., Lavergne Aff., Ex. C, *Fisher*, 645 F. Supp. 2d 587 (No. 08-263), ECF No. 96, *available at* http://www.utexas.edu/student/admissions/research/HB588-Report11.pdf.

4. Ishop Aff. ¶ 16, ECF No. 96. Additionally, Fisher did not apply for any academic programs with special application

past class rank to evaluate each applicant as an individual based on his or her achievements and experiences, and so became one of 17,131 applicants[5] for the remaining 1,216 seats[6] for Texas residents.

UT Austin denied Fisher admission. Kedra B. Ishop, the Associate Director of Admissions at the time of Fisher's application,[7] explained that "[g]iven the lack of space available in the fall freshman class due to the Top 10% Plan, . . . based on [her] high school class rank and test scores," Fisher could not "have gained admission through the fall review process."[8] As Ishop explained, any applicant who was not offered admission either through the Top Ten Percent Law or through an exceptionally high Academic Index ("AI") score is evaluated through the holistic review process.[9] The AI is calculated based on an applicant's standardized test

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processes, such as the Plan II Honors program or a Fine Arts program.

5. *Id.* ¶ 13.

6. *2008 Top Ten Percent Report* at 9 tbl.2b; *id.* at 8 tbl.2. Table 2 shows 8,984 Top Ten Percent students were admitted in 2008. The UT Associate Director of Admissions reported that 10,200 admissions slots are available for Texas residents. Ishop Aff. ¶ 12, ECF No. 96.

7. *Id.*

8. *Id.* ¶ 18.

9. *Id.* ¶ 4.

scores, class rank, and high school coursework.[10] Holistic review considers applicants' AI scores and Personal Achievement Index ("PAI") scores. The PAI is calculated from (i) the weighted average score received for each of two required essays and (ii) a personal achievement score based on a holistic review of the entire application, with slightly more weight being placed on the latter.[11] In calculating the personal achievement score, the staff member conducts a holistic review of the contents of the applicant's entire file, including demonstrated leadership qualities, extracurricular activities, honors and awards, essays, work experience, community service, and special circumstances, such as the applicant's socioeconomic status, family composition, special family responsibilities, the socioeconomic status of the applicant's high school, and race.[12] No numerical value is ever assigned to any of the

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10. *Id.* ¶ 3. The AI score is generated by adding the predicted grade point average ("PGPA") and the curriculum-based bonus points ("units plus"). *Id.* The PGPA is calculated using an applicant's SAT or ACT scores and class rank. *Id.* A units plus bonus of 0.1 points is added to the PGPA if the applicant took more than UT Austin's minimum high school coursework requirements in at least two of three designated subject areas. *Id.*

11. *Id.* ¶ 5. The PAI is calculated as follows: PAI = ((((essay score 1 + essay score 2)/2) * 3) + ((personal achievement score)*4))/7. Defs.' Cross-Mot. Summ. J., Ex. Tab 3 to App., Lavergne Dep. at 57:11-17, *Fisher*, 645 F. Supp. 2d 587 (No. 08-263), ECF No. 96 [hereinafter Lavergne Dep.].

12. Defs.' Cross-Mot. Summ. J., Ex. Tab 1 to App., Bremen Dep. at 16:15-17:13, 18:5-19:14, 44:1-44:6, *Fisher*, 645 F. Supp. 2d 587 (No. 08-263), ECF No. 96 [hereinafter Bremen Dep.]; Ishop Aff. ¶ 5, ECF No. 96; Defs.' Cross-Mot. Summ. J., Ex. Tab 2 to

components of personal achievement scores, and because race is a factor considered in the unique context of each applicant's entire experience, it may be a beneficial factor for a minority or a non-minority student.[13]

To admit applicants through this holistic review, the admissions office generates an initial AI/PAI matrix for each academic program, wherein applicants are placed into groups that share the same combination of AI and PAI scores.[14] School liaisons then draw stair-step lines along this matrix, selecting groups of students on the basis of their combined AI and PAI scores. This process is repeated until each program admits a sufficient number of students.

Fisher's AI scores were too low for admission to her preferred academic programs at UT Austin; Fisher had a Liberal Arts AI of 3.1 and a Business AI of 3.1.[15] And, because nearly all the seats in the undeclared major program in Liberal Arts were filled with Top Ten Percent students, all holistic review applicants "were only eligible for Summer Freshman Class or CAP [Coordinated Admissions Program] admission, unless their AI exceeded

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App., Ishop Dep. at 22:13-20, *Fisher*, 645 F. Supp. 2d 587 (No. 08-263), ECF No. 96 [hereinafter Ishop Dep.].

13. Ishop Aff. ¶ 5, ECF No. 96.

14. *Id.* ¶ 14. The AI scores are placed on one axis and the PAI scores are placed on the other axis. Students are then grouped based on their combination of AI and PAI scores.

15. *Id.* ¶ 18.

3.5."[16] Accordingly, even if she had received a perfect PAI score of 6, she could not have received an offer of admission to the Fall 2008 freshman class.[17] If she had been a minority the result would have been the same.

B

This reality together with factual developments since summary judgment call into question whether Fisher has standing.[18] UT Austin argues that Fisher lacks standing because (i) she graduated from another university in May 2012, thus rendering her claims for injunctive and declaratory relief moot,[19] and (ii) there is no causal relationship between any use of race in the decision to

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16. *Id.*

17. *Id.* At the preliminary injunction stage, UT Austin suggested that it was unable to determine whether Fisher (or Michalewicz) would have been admitted without re-running the entire admissions process. Opp. Mot. Prelim. Injunction at 12, *Fisher*, 645 F. Supp. 2d 587 (No. 08-263), ECF No. 42. Regardless, it became clear in the summary judgment record that whether Fisher would have been admitted even if she had a perfect PAI score presented no genuine issue of fact. She would not have been admitted. The same was true for Michalewicz, then a co-plaintiff.

18. Plaintiffs "must show that (1) they have suffered an injury in fact, (2) a causal connection exists between the injury and challenged conduct, and (3) a favorable decision is likely to redress the injury." *Adar v. Smith*, 639 F.3d 146, 150 (5th Cir. 2011) (en banc) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

19. Appellees' Statement Concerning Further Proceedings on Remand at 5.

deny Fisher admission and the $100 application fee—a nonrefundable expense faced by all applicants that puts at issue whether Fisher suffered monetary injury[20]

Two competing and axiomatic principles govern the resolution of this question. First, jurisdiction must exist at every stage of litigation. A litigant "generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance."[21] Even if "defendants failed to challenge jurisdiction at a prior stage of the litigation, they are not prohibited from raising it later."[22] Indeed, the "independent establishment of subject-matter jurisdiction is so important that [even] a party ostensibly invoking federal jurisdiction may later challenge it as a means of avoiding adverse results on the merits."[23]

Second, the "mandate rule," a corollary of the law of the case doctrine, "compels compliance on remand with the dictates of a superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate

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20. As we will explain, Fisher's odds of admission were affected by the Top Ten Percent Plan, which filled all but around 1,200 seats of the incoming class. Competition drove the automatic rejection score up to a 3.5 AI score.

21. *Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 576, 124 S. Ct. 1920, 158 L. Ed. 2d 866 (2004) (citations omitted).

22. *Arena v. Graybar Elec. Co., Inc.*, 669 F.3d 214, 223 (5th Cir. 2012).

23. *Id.* (quoting 13 Charles Alan Wright, et al., Fed. Practice & Procedure § 3522 at 122-23 (3d ed. 2008)).

court."[24] The Supreme Court, like all Article III courts, had its own independent obligation to confirm jurisdiction, and where the lower federal court "lack[ed] jurisdiction, [the Supreme Court has] jurisdiction on appeal, not of the merits, but merely for the purpose of correcting the error of the lower court in entertaining the suit."[25]

UT Austin's standing arguments carry force,[26] but in our view the actions of the Supreme Court do not allow our reconsideration. The Supreme Court did not address the issue of standing, although it was squarely presented to it.[27] Rather, it remanded the case for a decision on the merits, having reaffirmed Justice Powell's opinion for the Court in *Regents of the University of California v. Bakke*[28] as read by the Court in *Grutter v. Bollinger.*[29] It affirmed all of this Court's decision except its application of strict scrutiny. The parties have identified no changes

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24. *United States v. Lee*, 358 F.3d 315, 321 (5th Cir. 2004) (citing *United States v. Bell*, 988 F.2d 247, 251 (1st Cir. 1993)).

25. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998).

26. Notably, in her supplemental briefing Fisher argues only that she had suffered an "injury in fact." Supp. Br. of Appellant 12-13. Instead of addressing redressability, she argues only that the question of remedies is a separate inquiry. *Id.* at 13-14. Regardless of the district court's bifurcation of merits and remedies, the redressability of an injury is integral to the standing inquiry.

27. *See* Br. of Resp. 6-20.

28. 438 U.S. 265

29. 539 U.S. 306

in jurisdictional facts occurring since briefing in the Supreme Court. Fisher's standing is limited to challenging the injury she alleges she suffered—the use of race in UT Austin's admissions program for the entering freshman class of Fall 2008.

II

We turn to the question whether we can and should remand this case. The Supreme Court's mandate frames its resolution, ordering that "[t]he judgment of the Court of Appeals is vacated, and the case remanded for further proceedings consistent with this opinion." The mandate must be read against the backdrop of custom that accords courts of appeal discretion to remand to the district court on receipt of remands to it for proceedings consistent with the opinion—a customary discretion not displaced but characterized by nigh boiler plate variations in phrasing of instructions such as "on remand the Court of Appeals may 'consider,'" or "for the Court of Appeals to consider in the first instance."[30]

A

Fisher argues that the Supreme Court's remanding language—"fairness to the litigants and the courts that heard the case requires that it be remanded so that the admissions process can be considered and judged under a

30. *See, e.g., Spector v. Norwegian Cruise Line, Ltd.*, 427 F.3d 285, 286 (5th Cir. 2005); *United States v. Williamson*, 47 F.3d 1090 (11th Cir. 1995); *FW/PBS, Inc. v. City of Dall.*, 896 F.2d 864, 865 (5th Cir. 1990).

correct analysis"[31]—compels the conclusion that "fairness" must be achieved by having this Court, and not the district court, conduct the inquiry. Fisher relies on the Supreme Court's statement that "the Court of Appeals must assess whether the University has offered sufficient evidence that its admissions program is narrowly tailored to obtain the educational benefits of diversity."[32] And Fisher argues that at summary judgment, all parties conceded that there were no genuine issues of material fact to be resolved and that the case should be decided on summary judgment.

UT Austin opposes this parsing of language, arguing that Fisher fails to credit (i) the entirety of the Supreme Court's references which spoke, not just to the fairness of allowing this Court to correct its error, but also to the fairness to the district court, which first heard the case and was faulted for the same error as this Court; and, (ii) that the language used by the Supreme Court is the common language of remand orders and is often followed by a remand to the district court. UT Austin notes that in its remanding language, the Supreme Court cites *Adarand Constructors, Inc. v. Pena*,[33] where the court of appeals remanded to the district court after the Supreme Court vacated the judgment of the court of appeals for failure to apply strict scrutiny. Finally, UT Austin argues that the remand language, at best, is ambiguous and, given the custom of the courts of appeals, should not be read

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31. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2421, 186 L. Ed. 2d 474 (2013).

32. *Id.*

33. 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995).

to foreclose the clear discretion of this Court to remand absent specific, contrary instructions from the Supreme Court.

Given the customary practice of the courts of appeals and the less than clear language of the Supreme Court's remand, we are not persuaded that the Supreme Court intended to foreclose our discretion to remand to the district court. A review of the Supreme Court's language lends but little support to each side. Yet, this is telling. Had the Supreme Court intended to control the discretion of this Court as to whether the district court should first address an error that the Supreme Court found was made by both courts, there would have been no uncertainty in the remand language. The question whether we should remand remains.

B

There is no clear benefit to remanding this case to the district court. The suggestion, without more, that discovery may be necessary given the Supreme Court's holding regarding proper scrutiny and deference adds nothing. Admittedly, this case differs from *Grutter*, in that *Grutter* went to trial. And evidence offered by live witnesses is far more likely to surface and resolve fact issues than summary judgment evidence crafted by advocates. But that too is far from certain. Indeed, UT Austin's argument goes no further than "factual questions or disputes may arise on remand."[34] Notably, UT Austin

34. Defs.' Mot. to Remand at 4.

does not argue that a trial will be necessary. Rather its principal target on remand is standing, with questions that continue to haunt, but are foreclosed by the Supreme Court's implicit finding of standing, questions only it can now address.

We find that there are no new issues of fact that need be resolved, nor is there any identified need for additional discovery; that the record is sufficiently developed; and that the found error is common to both this Court and the district court. It follows that a remand would likely result in duplication of effort. We deny UT Austin's motion for remand, and turn to the merits.

III

A

In remanding, the Supreme Court held that its decision in *Grutter* requires that "strict scrutiny must be applied to any admissions program using racial categories or classifications";[35] that "racial classifications are constitutional only if they are narrowly tailored to further compelling governmental interests."[36] Bringing forward Justice Kennedy's dissent in *Grutter*, the Supreme Court faulted the district court's and this Court's review of UT Austin's means to achieve the permissible goal of diversity—whether UT Austin's efforts were narrowly tailored to achieve the end of a diverse student body. Our charge is to give exacting scrutiny to these efforts.

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35. *Fisher*, 133 S. Ct. at 2419.

36. *Grutter*, 539 U.S. at 326.

The Supreme Court has made clear that "a university's educational judgment that such diversity is essential to its educational mission is one to which we defer."[37] The "decision to pursue the educational benefits that flow from student body diversity that the University deems integral to its mission is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper under *Grutter*."[38] Accordingly, a court "should ensure that there is a reasoned, principled explanation for the academic decision."[39]

In both *Fisher* and *Grutter*, the Supreme Court endorsed Justice Powell's conclusion that "attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education;"[40] that in contrast to "[r]edressing past discrimination, . . . [t]he attainment of a diverse student body . . . serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes";[41] that the "academic mission of a university is a special concern of the First Amendment . . . [and part] of the business of a university [is] to provide that atmosphere which is most conducive to speculation, experiment, and creation, and this in turn leads to the question of who may

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37. *Fisher*, 133 S. Ct. at 2419 (quoting *Grutter*, 539 U.S. at 328) (internal quotation marks omitted).

38. *Id.* (internal quotation marks and citations omitted).

39. *Id.*

40. *Bakke*, 438 U.S. at 311.

41. *Fisher*, 133 S. Ct. at 2417-18.

be admitted to study."[42] It signifies that this compelling interest in "securing diversity's benefits . . . is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students."[43] Rather, "diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[44] Justice Powell found Harvard's admissions program to be particularly commendable.[45] There an applicant's race was but one form of diversity that would be weighed against qualities such as "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important."[46] *Bakke* envisions a rich pluralism for American institutions of higher education, one at odds with a one-size-fits-all conception of diversity, indexed to the ways in which a diverse student body contributes to a university's distinct educational mission, not numerical measures.[47]

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42. *Id.* at 2418.

43. *Id.* (internal quotation marks and citations omitted).

44. *Id.*

45. *Id.*

46. *Id.* at 317.

47. Justice Powell's opinion pointed to this accent upon mission at Harvard—one akin to an aged tradition at Oxford—to shape lives, not just fill heads with facts.

Diversity is a composite of the backgrounds, experiences, achievements, and hardships of students to which race only contributes. "[A] university is not permitted to define diversity as some specified percentage of a particular group merely because of its race or ethnic origin" because that "would amount to outright racial balancing, which is patently unconstitutional."[48] Instead, *Grutter* approved the University of Michigan Law School's goal of "attaining a critical mass of under-represented minority students," and noted that such a goal "does not transform its program into a quota."[49]

B

In language from which it has not retreated, the Supreme Court explained that the educational goal of diversity must be "defined by reference to the educational benefits that diversity is designed to produce."[50] Recognizing that universities do more than download facts from professors to students, the Supreme Court recognized three distinct educational objectives served by diversity: (i) increased perspectives, meaning that diverse perspectives improve educational quality by making classroom discussion "livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds";[51] (ii) professionalism, meaning that "student body diversity .

48. *Grutter*, 539 U.S. at 330 (citing *Bakke*, 438 U.S. at 307).

49. *Id.* at 335-36.

50. *Id.* at 329-30.

51. *Id.* at 330.

. . better prepares [students] as professionals," because the skills students need for the "increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints";[52] and, (iii) civic engagement, meaning that a diverse student body is necessary for fostering "[e]ffective participation by members of all racial and ethnic groups in the civil life of our Nation[, which] is essential if the dream of one Nation, indivisible, is to be realized."[53] All this the Supreme Court reaffirmed, leaving for this Court a "further judicial determination that the admissions process meets strict scrutiny in its implementation";[54] that is, its means of achieving the goal of diversity are narrowly tailored.

A university "must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal."[55] And a university "receives no deference" on this point because it is the courts that must ensure that the "means chosen to accomplish the [university's] asserted purpose . . . be specifically and narrowly framed to accomplish that purpose."[56] Although "a court can take account of a university's experience and expertise in adopting or rejecting certain admissions processes," it remains a university's burden to demonstrate and the court's obligation to determine whether the "admissions processes ensure that each applicant is evaluated as an

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52. *Id.*

53. *Id.* at 332.

54. *Fisher*, 133 S. Ct. at 2419-20.

55. *Id.* at 2420.

56. *Id.* (internal quotation marks and citations omitted).

individual, and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."[57]

C

Narrow tailoring requires that the court "verify that it is 'necessary' for a university to use race to achieve the educational benefits of diversity."[58] Such a verification requires a "careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications."[59] Thus, the reviewing court must "ultimately be satisfied that no workable raceneutral alternatives would produce the educational benefits of diversity."[60] It follows, therefore, that if "a nonracial approach . . . could promote the substantial interest about as well and at tolerable expenses, . . . then the university may not consider race."[61] And it is the university that bears "the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice."[62]

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57. *Id.* (quoting *Grutter*, 539 U.S. at 337) (internal quotation marks and citations omitted).

58. *Id.* (quoting *Bakke*, 438 U.S. at 305).

59. *Id.*

60. *Id.* (emphasis added).

61. *Id.* (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6, 106 S. Ct. 1842, 90 L. Ed. 2d 260 (1986) (internal quotation marks omitted)).

62. *Id.*

The Supreme Court emphasized that strict scrutiny must be balanced. That is, "[s]trict scrutiny must not be strict in theory, but fatal in fact," yet it must also "not be strict in theory but feeble in fact."[63]

IV

A

Fisher insists that our inquiry into narrow tailoring begin in 2004, the last year before UT Austin adopted its current race-conscious admissions program. Looking to that year, Fisher argues that the Top Ten Percent Plan had achieved a substantial combined Hispanic and African-American enrollment of approximately 21.5%;[64] and that this is more minority enrollment than present in *Grutter*, where a race-conscious plan grew minority enrollment from approximately 4% to 14%. Because UT Austin was already enrolling a larger percentage of minorities than the Michigan Law School, the argument maintains, UT Austin had achieved sufficient diversity to attain the educational benefits of diversity, a critical mass, before it adopted a race-conscious admissions policy; that even if sufficient diversity had not been achieved by 2004, it had been achieved by 2007 when the combined percentage of Hispanic and African-American enrolled students was 25.5%. Thus, Fisher argues, the race-conscious admissions policy had a *de minimis* effect, at most adding 0.92% African-American enrollment and

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63. *Id.* at 2421.

64. *2008 Top Ten Percent Report* at 6 tbl.1.

2.5% Hispanic enrollment; that a slight contribution is not a "constitutionally meaningful" impact on student body diversity and is no more than an exercise in gratuitous racial engineering.

This effort to truncate the inquiry clings to a baseline that crops events Fisher's claim ignores, as it must. The true narrative presents with a completeness both fair and compelled by the Supreme Court's charge to ascertain the facts in full without deference, exposing the *de minimis* argument as an effort to turn narrow tailoring upside down. We turn to that narrative.

B

In 1997, following the *Hopwood v. Texas*[65] decision, UT Austin faced a nearly intractable problem: achieving diversity—including racial diversity—essential to its educational mission, while not facially considering race even as one of many components of that diversity. Forbidden any use of race after *Hopwood*, UT Austin turned to the Top Ten Percent Plan, which guarantees Texas residents graduating in the top ten percent of their high school class admission to any public university in Texas. Such a mechanical admissions program could have filled every freshman seat but standing alone it was not a workable means of achieving the diversity envisioned by *Bakke*, bypassing as it did high-performing multi-talented students, minority and non-minority. With its blindness

65. 78 F.3d 932 (5th Cir. 1996), *abrogated by Grutter*, 539 U.S. at 322.

to all but the single dimension of class rank, the Top Ten Percent Plan came with significant costs to diversity and academic integrity, passing over large numbers of highly qualified minority and non-minority applicants. The difficulties of Texas's and other states' percentage plans did not escape the Court in *Grutter*, which explained that "even assuming such plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university."[66]

Nor did these difficulties escape the Texas legislature. Opponents to the proposed plan noted that such a policy "could actually harm institutions" and "would not solve the problems created by [*Hopwood*]."[67] So the legislature adopted a Top Ten Percent Plan that left a substantial number of seats to a complementary holistic review process. Foreshadowing *Grutter*, admission supplementing the Top Ten Percent Plan included factors such as socioeconomic diversity and family educational achievements but, controlled by *Hopwood*, it did not include race. In short, a holistic process sans race controlled the gate for the large percent of applicants not entering through the Top Ten Percent Plan. Over the succeeding years the Top Ten Percent Plan took an increasing number of seats, a take inherent in its structure and a centerpiece of narrow tailoring, as we will explain.

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66. *Grutter*, 539 U.S. at 340.

67. Pls.' Mot. Summ. J., Ex. 27, *Fisher*, 645 F. Supp. 2d 587 (No. 08-263), ECF No. 94 (HB 588, House Research Organization Digest, Apr. 15, 1997).

C

We are offered no coherent response to the validity of a potentially different election by UT Austin: to invert the process and use *Grutter*'s holistic review to select 80% or all of its students. Such an exponential increase in the use of race under the flag of narrow tailoring is perverse. *Grutter* blessed an admissions program, applied to the entire pool of students competing for admission, which "considers race as one factor among many, in an effort to assemble a student body that is diverse in ways broader than race." Affording no deference, we look for narrow tailoring in UT's Austin's use of this individualized race-conscious holistic review, applied as it is only to a small fraction of the student body as the rest is consumed by race-neutral efforts.

Close scrutiny of the data in this record confirms that holistic review—what little remains after over 80% of the class is admitted on class rank alone—does not, as claimed, function as an open gate to boost minority headcount for a racial quota. Far from it. The increasingly fierce competition for the decreasing number of seats available for Texas students outside the top ten percent results in minority students being *under-represented*—and white students being over-represented—in holistic review admissions relative to the program's impact on each incoming class. In other words, for each year since the Top Ten Percent Plan was created through 2008, holistic review contributed a greater percentage of the incoming class of Texans as a whole than it did the incoming minority students. Examples illustrate this

effect. Of the incoming class of 2008, the year Fisher applied for admission, holistic review contributed 19% of the class of Texas students as a whole—but only 12% of the Hispanic students and 16% of the black students, while contributing 24% of the white students.[68] The incoming class of 2005, the year that the *Grutter* plan was first introduced, is similar. That year, 31% of the class of Texas students as a whole was admitted through holistic review (with the remaining 69% of incoming seats for Texans filled by the Top Ten Percent Plan)—but only 21% of the Hispanic Texan students in the incoming class were admitted through holistic review, and 26% of the incoming black Texan students, but 35% of the incoming white Texan students.[69] Minorities being under-represented in holistic review admission relative to the impact of holistic review on the class as a whole holds true almost without exception for both blacks and Hispanics for every year from 1996-2008,[70] and can be seen in the chart attached to this opinion at Appendix 1.

Given the test score gaps between minority and non-minority applicants, if holistic review was not designed

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68. *2008 Top Ten Percent Report* at 7 tbl.1a.

69. Office of Admissions, Univ. of Tex. at Austin, *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin: Demographic Analysis of Entering Freshmen 2006 and Academic Performance of Top 10% and Non-Top 10% Students Academic Years 1996-2005*, at 5 tbl.1a (Dec. 6, 2007)) [hereinafter *2006 Top Ten Percent Report*], Pls.' Mot. Summ. J., Ex. 25, *Fisher*, 645 F. Supp. 2d 587 (No. 08-263), ECF No. 94, *available at* http://www.utexas.edu/student/admissions/research/HB588-Report-VolumeI.pdf.

to evaluate each individual's contributions to UT Austin's diversity, including those that stem from race, holistic admissions would approach an all-white enterprise. Data for the entering Texan class of 2005, the first year of the *Grutter* plan, show that Hispanic students

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70. Later editions of the same reports available as public data show that as the take of the Top Ten Percent Plan continued to grow, this effect intensified. In 2009, when the holistic review program was left with only 14.4% of the seats available for Texas residents, only 6.3% of Hispanic enrolled students were admitted through holistic review and 10.0% of blacks, but 18.8% of whites. Office of Admissions, Univ. of Tex. at Austin, *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin: Demographic Analysis of Entering Freshmen Fall 2009 and Academic Performance of Top 10% and Non-Top 10% Students Academic Years 2004-2008 (Report 12)*, at 8 tbl.1a (Oct. 29, 2009) [hereinafter *2009 Top Ten Percent Report*], *available at* http://www.utexas.edu/student/admissions/research/HB588-Report12.pdf; *see also* Office of Admissions, Univ. of Tex. at Austin, *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin: Demographic Analysis of Entering Freshmen Fall 2010 and Academic Performance of Top 10% and Non-Top 10% Students Entering Freshmen 2009 (Report 13)* (Dec. 23, 2010) [hereinafter *2010 Top Ten Percent Report*], *available at* http://www.utexas.edu/student/admissions/research/HB588-Report13.pdf. The passage of SB 175 allowed UT Austin to reset the take of the automatic admissions program to a minimum of 75% of the admissions slots, but the effect continued. William Powers Jr., Univ. of Tex. at Austin, *Report to the Governor, the Lieutenant Governor, and the Speaker of the House of Representatives on the Implementation of SB 175, 81st Legislature, for the Period Ending Fall 2013*, at 29 tbl.4.1 (Dec. 20, 2013) [hereinafter *2013 Powers Report*], *available at* http://www.utexas.edu/student/admissions/research/SB_175_Report_for_2013.pdf.

admitted through holistic review attained an average SAT score of 1193, African-American students an 1118, and white students a 1295.[71] For the entering class of 2007, the last class before Fisher applied for admission, the corresponding data were 1155 for Hispanic students, 1073 for African American students, and 1275 for white students, this from a universe of underperforming secondary schools.[72] As we have explained, the impact of the holistic review program on minority admissions is already narrow, targeting students of all races that meet both the competitive academic bar of admissions and have unique qualities that complement the contributions of Top Ten Percent Plan admittees.

D

UT Austin did not stop with the Top Ten Percent Plan in its effort to exhaust racially neutral alternatives to achieving diversity. It also initiated a number of outreach and scholarship efforts targeting under-represented demographics, including the over half of Texas high school graduates that are African-American or Hispanic.[73]

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71. *2006 Top Ten Percent Report* at 11-14.

72. *2008 Top Ten Percent Report* at 12-15.

73. The Texas public high school graduating class of 2008, the year Fisher graduated from high school, included 13.4% African-American and 37.5% Hispanic students. Div. of Performance Reporting, Tex. Educ. Agency, *2008-09 Texas Public School Statistics Pocket Edition*, at 3 (December 2009), *available at* http://ritter.tea.state.tx.us/perfreport/pocked/2009/pocked0809.pdf. This means that of this majority-minority cohort

Programs included the Longhorn Opportunity Scholarship Program, the Presidential Achievement Scholarship Program, the First Generation Scholarship, and increased outreach efforts. Implemented in 1997, the Longhorn Opportunity Scholarship Program offers scholarships to graduates of certain high schools throughout Texas that had predominantly low-income student populations and a history of few, if any, UT Austin matriculates.[74] It guarantees a specific number of scholarships for applicants who attend these schools, graduate within the top ten percent, and attend UT Austin. The Presidential Achievement Scholarship program is a need-based scholarship that is awarded based on the applicant's family income, high school characteristics, and academic performance as compared to his or her peers at that

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of 33,873 African-American and 94,571 Hispanic high school, or 128,444 minority graduates in all, UT admitted 728 African-Americans and 2,621 Hispanics—or 2.6% of the graduating minority seniors of Texas. *See id.* at 5; *see generally 2008 Top Ten Percent Report* at 6 tbl.1. As the percentage of Hispanic high school graduates has continued to increase, over 57.3% of the high school graduating class of 2011, the most recent year for which the Texas Education Agency has published statistics, are African-American or Hispanic. Div. of Performance Reporting, Tex. Educ. Agency, *2011-12 Texas Public School Statistics Pocket Edition*, at 1, *available at* http://www.tea.state.tx.us/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=2147511872&libID=2147511859.

74. Defs.' Cross-Mot. Summ. J., Ex. Tab 9 to App., Orr Aff. at ¶ 7, *Fisher*, 645 F. Supp. 2d 587 (No. 08-263), ECF No. 96 [hereinafter Orr Aff.]. Initially, this program targeted 39 high schools, but expanded to 69 high schools by 2009. *Id.*

high school.[75] The First Generation Scholarship Program targets applicants who are the first in their family to attend college. [76]UT Austin invested substantial amounts of money in these scholarship programs. Between 1997 and 2007, UT Austin awarded $59 million through these scholarships.[77] Indeed, in 2007, UT Austin awarded $5.8 million for the Longhorn Opportunity and Presidential Achievement scholarship programs alone.[78]

UT Austin also expanded its outreach and recruitment efforts by increasing its recruitment budget by $500,000, by adding three regional admissions centers in Dallas, San Antonio, and Harlingen,[79] by engaging in outreach programs that brought prospective students to UT Austin for day-lon or overnight visits,[80] and by hosting multi-day campus conferences for high school counselors.[81] These regional admissions centers reflect a substantial investment by UT Austin: the Dallas Admissions center employed 4 new full-time staff, the San Antonio Admissions Center employed 4 new full-time staff, and the

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75. Defs.' Cross-Mot. Summ. J., Ex. Tab 4 to App., Orr Dep. at 15:17-21, *Fisher*, 645 F. Supp. 2d 587 (No. 08-263), ECF No. 96 [hereinafter Orr Dep.]; Orr Aff. ¶ 6, ECF No. 96.

76. Orr Aff. ¶ 8, ECF No. 96.

77. *Id.* ¶ 9.

78. *Id.* ¶ 9.

79. *Id.* ¶ 11.

80. *Id.* ¶ 16-19.

81. *Id.* ¶ 20.

Harlingen Admissions Center employed 5 new full-time staff.[82] The stated goal of these centers was "to increase [UT Austin's] visibility and interaction with prospective students, parents and high school administrators within the geographic market they existed [sic]. These centers allowed for increased quality and quantity of counseling, face to face discussions, and programming within the prospective students' home city."[83] Additionally, staff from these regional centers helped organize "over 1,000 College Night/Day events held at High Schools across the state" and "around 1,000 Day Visits to High Schools around the state in an effort to encourage prospective top 10% students to apply and enroll at [UT Austin]."[84] Relatedly, the admissions office also held targeted recruiting events for students from the Dallas, San Antonio, Houston, and Rio Grande Valley areas. These events included the "Longhorn Lock-in," wherein students from targeted high schools would spend the night at UT Austin; the UT Scholars Program, wherein scholarship recipients from targeted schools would spend the night at UT Austin; and "Longhorn for a Day," wherein students from targeted schools would spend the day at UT Austin.[85] Finally, the admissions office would hold four "Longhorn Saturday Events" on campus, where thousands of prospective students and their families would come to UT Austin.[86]

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82. *Id.* ¶ 11.

83. *Id.*

84. *Id.*

85. *Id.* ¶ 16-18.

86. *Id.* ¶ 19.

In addition to the admissions office's efforts, UT Austin's Office of Student Financial Services increased their outreach efforts by putting together the Financial Aid Outreach Group to visit high schools to help prospective students "understand the financial support offered by [UT Austin]."[87] The goal of this Financial Aid Outreach Group "was to convince low income students that money should not be a barrier to attending college."[88]

"Narrow tailoring does not require exhaustion of every race neutral alternative," but rather "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."[89] Put simply, this record shows that UT Austin implemented every race-neutral effort that its detractors now insist must be exhausted prior to adopting a race-conscious admissions program—in addition to an automatic admissions plan not required under *Grutter* that admits over 80% of the student body with no facial use of race at all.

E

Despite UT Austin's rapid adoption of these race-neutral efforts, in 1997—the first freshman class after *Hopwood*—the percentage of African-American admitted students fell from 4.37% to 3.41%, representing a drop

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87. *Id.* ¶ 12.

88. *Id.*

89. *Grutter*, 539 U.S. at 339.

from 501 to 419 students even as the total number of admitted students increased by 833 students.[90] Similarly, the percentage of Hispanic admitted students fell from 15.37% to 12.95%.[91] With UT Austin's facially race-neutral admissions program and outreach efforts, the percentage of African-American and Hispanic admitted students eventually recovered to pre-*Hopwood* levels. By 2004, African-American admitted students climbed to 4.82% and Hispanic admitted students climbed to 16.21%.[92] But minority representation then remained largely stagnant, within a narrow oscillating band, rather than moving towards a critical mass of minority students. The hard data show that starting in 1998 and moving toward 2004, African-American students comprised 3.34%, then 4.32%, then 4.24%, then 3.49%, then 3.67%, then 3.89%, and finally 4.82% of the admitted pool.[93] Similarly, Hispanic admitted students represented 13.53%, then 14.27%, then 13.75%, then 14.25%, then 14.43%, then 15.60%, and finally 16.21% of the entering classes for those respective years.[94]

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90. *See 2006 Top Ten Percent Report* 4 tbl.1. African-American admits comprised 3.34% of the entering class of 1998; 4.32% of the class of 1999; 4.24% of the class of 2000; 3.49% of the class of 2001; 3.67% of the class of 2002; and 3.89% of the class of 2003. *See id.*

91. *Id.* Hispanics represented 13.53% of the entering class of 1998; 14.27% of the class of 1999; 13.75% of the class of 2000; 14.25% of the class of 2001; 14.43% of the class of 2002; 15.60% of the class of 2003; and 16.21% for 2004. *See id.*

92. *Id.*

93. *Id.*

94. *Id.*

Appendix A

V

A

Numbers aside, the Top Ten Percent Plan's dependence upon a distinct admissions door remained apparent. With each entering class, there was a gap between the lower standardized test scores of students admitted under the Top Ten Percent Plan and the higher scores of those admitted under holistic review. For example, in 2008—the year Fisher applied for admission—81% of the seats available to Texas residents were taken up by the Top Ten Percent Plan.[95] These Top Ten Percent students had an average standardized test score of 1219, 66 points lower than the average standardized test score of 1285 attained by Texas students admitted under holistic review or on the basis of a high AI.[96] A gap persisted not only among students overall and white students, but also among racial

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95. *2008 Top Ten Percent Report* at 9 tbl.2.

96. *Id.* Data for the preceding years showed a similar test score gap. For the entering Texas class of 2007, Top Ten Percent students had an average standardized test score of 1225 versus the average standardized test score of 1246 attained by non-Top Ten Percent Texas students. Similarly, in 2006, Top Ten Percent students had an average standardized test score of 1220 versus an average standardized test score of 1257 for non-Top Ten Percent students. For 2005, Top Ten Percent students had an average standardized test score of 1226 versus an average standardized test score of 1277 for non-Top Ten Percent students. Finally, in 2004, Top Ten Percent students had an average standardized test score of 1221 versus an average standardized test score of 1258 for non-Top Ten Percent students. *Id.*

and ethnic minority students.[97] This inheres in the reality that the strength of the Top Ten Percent Plan is also its weakness, one that with its single dimension of selection makes it unworkable standing alone.

B

The sad truth is that the Top Ten Percent Plan gains diversity from a fundamental weakness in the Texas secondary education system. The de facto segregation

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97. *Id.* at 9, 13-15. For minority students, difference in average standardized test scores between admitted Texas Top Ten Percent students and non-Top Ten Percent students fluctuated in size but remained significant in the pre- and post-*Grutter* years leading up to Fisher's application. Among Hispanic students, the gap was 1100 versus 1189 in 2003; 1110 versus 1189 in 2004; 1122 versus 1193 in 2005; 1105 versus 1154 in 2006; and 1115 versus 1155 in 2007. For African-American students, the gap was 1063 versus 1065 in 2003; 1046 versus 1116 in 2004; 1059 versus 1118 in 2005; 1067 versus 1086 in 2006; and 1078 versus 1073 in 2007. *See id.* at 14-15. And a comparison of raw SAT scores does not tell the full story, as SAT scores are scaled. *See, e.g.*, CollegeBoard SAT, 2006 College-Bound Seniors: Total Group Profile Report (2006), *available at* http://media.collegeboard.com/digitalServices/pdf/research/cb-seniors-2006-national-report. pdf. Looking at the percentile point gives a better picture. For SAT test-takers in 2006, the 50th percentile combined score was 1020, while a 75th percentile score was 1180, a mere 160 points higher. *Id.* at 2. Thus, a score differential of 80 points, for example, which represents the approximate differential between holistic review and Top Ten Percent Hispanic admittees, represents students scoring at approximately a 12-13 higher percentile.

of schools in Texas[98] enables the Top Ten Percent Plan to increase minorities in the mix, while ignoring contributions to diversity beyond race. We assume, as none here contends otherwise, that this "segregation [is] not the 'product . . . of state action but of private choices,' having no 'constitutional implications'" and therefore it is "a question for the political branches to decide[] the manner—which is to say the *process*—of its resolution."[99] In short, these demographics are directly relevant to the choices made by the political branches of Texas as they acted against the backdrop of this unchallenged reality in their effort to achieve a diverse student body. Texas is here an active lab of experimentation embraced by the

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98. For example, only 8.1% of all students in Houston ISD are white. *See* Houston Indep. Sch. Dist., 2011-2012 Facts and Figures 1 (2012). Similarly, only 4.6% of students in the Dallas Independent School District are white. See Dallas Indep. Sch. Dist., Enrollment Statistics (2012). And in San Antonio ISD, only 1.9% of the students are white. *See* San Antonio Indep. Sch. Dist., Facts and Figures (2012). This de facto school segregation stems from residential patterns and means that students in the top ten percent of a highly segregated school likely grew up in the same residential zone. The top 29 graduates from Jack Yates High School in Houston live in the same predominately African-American neighborhood of that city's Third Ward, and thus likely experienced a similar cultural environment. *See* Amicus Curiae Br. of the Family of Heman Sweatt (Oct. 31, 2013) at 27. This pattern repeats itself across the high schools of Texas's urban areas.

99. *Schuette v. BAMN*, 134 S. Ct. 1623, 1642, 188 L. Ed. 2d 613 (2014) (Scalia, J., concurring) (citing *Freeman v. Pitts*, 503 U.S. 467, 495-96, 112 S. Ct. 1430, 118 L. Ed. 2d 108) (1992)).

Court in *Schuette v. BAMN*.[100] We reference here these unchallenged facts of resegregation not in justification of a racial remedy, but because the racial makeup and relative performance of Texas high schools bear on the workability of an alternative to any use of race for 80% of student admissions to UT Austin. The political branches opted for this facially race-neutral alternative—a narrow tailoring in implementation of their goal of diversity.

Fisher's claim can proceed only if Texas must accept this weakness of the Top Ten Percent Plan and live with its inability to look beyond class rank and focus upon individuals. Perversely, to do so would put in place a quota system pretextually race neutral. While the Top Ten Percent Plan boosts minority enrollment by skimming from the tops of Texas high schools, it does so against this backdrop of increasing resegregation in Texas public schools,[101] where over half of Hispanic students and 40% of black students attend a school with 90%-100% minority enrollment.[102]

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100. 134 S. Ct. 1623, 188 L. Ed. 2d 613 (2014).

101. A striking visual depiction of de facto residential segregation, showing one colored dot per person using 2010 census data, displays nearly monochrome units dividing the major metropolitan areas of Texas. *See* Demographics Research Grp., Weldon Ctr. for Public Serv., Univ. of Va., *2010 Racial Dot Map*, CooperCenter.org (July 2013), http://demographics.coopercenter.org/DotMap/index.html.

102. Gary Orfield, John Kucsera & Genevieve Siegel-Hawley, Civil Rights Project, E Pluribus . . . Separation: A Deepening Double Segregation for More Students 46, 50 (2012),

Appendix A

Data for the year Fisher graduated high school show that gaps between the quality of education available to students at integrated high schools and at majority-minority schools are stark. Their impact upon UT Austin is direct. The Top Ten Percent Plan draws heavily from the population concentrations of the three major metropolitan areas of Texas—San Antonio, Houston, and Dallas/Fort Worth—where over half of Texas residents live and where the outcomes gaps of segregated urban schools are most pronounced.[103] The San Antonio metropolitan area demonstrates this effect. Boerne Independent School District ("ISD") achieved a "recognized status" and five "Gold Performance Acknowledgments" from the Texas

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available at http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-morestudents/orfield_epluribus_revised_omplete_2012.pdf.

103. The total Texas population for 2008 was 24,326,974. U.S. Census Bureau, Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2000 to July 1, 2008, tbl.1, *available at* http://www.census.gov/popest/data/historical/2000s/vintage_2008/. Of these, 57.8%, or 14,059,594 people, lived in the Dallas/Fort Worth, Houston, and San Antonio metropolitan areas. *See* U.S. Census Bureau, Annual Estimates of the Population of Metropolitan and Micropolitan Statistical Areas: April 1, 2000 to July 1, 2008, tbl.1, *available at* http://www.census.gov/popest/data/historical/2000s/vintage_2008/metro.html (showing that 6,300,006 lived in the Dallas/Fort Worth metropolitan area; 5,728,143 lived in the Houston metropolitan area; and 2,031,445 lived in the San Antonio metropolitan area in 2008).

Education Agency.[104] At this relatively integrated school district, 79.9% of graduating students were white and 19.2% were black or Hispanic.[105] Over 97% of students graduated high school.[106] They achieved an average SAT score of 1072, and 61% were deemed college-ready in both English and Math by the Texas Education Agency.[107] San Antonio ISD, its neighbor, a highly segregated and "academically unacceptable" district,[108] tells a different story. 86.8% of graduating students were Hispanic and 8.2% were black, and over 90% were economically disadvantaged.[109] Only 59.1% of the high school class of 2008 graduated; SAT test takers achieved an average score of 811; and only 28% of graduates were college-ready in both English and Math.[110]

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104. *2008-09 Academic Indicator System, Boerne ISD*, Tex. Educ. Agency, 1 [hereinafter *Boerne ISD Indicator*], http://ritter.tea.state.tx.us/perfreport/aeis/2009/district.srch.html (accessed by searching for the relevant school district on the search engine).

105. *Id.* § II, at 1.

106. *Id.* § I, at 11.

107. *Id.* § I, at 12.

108. *2008-09 Academic Indicator System, San Antonio ISD*, Tex. Educ. Agency, § II, at 1 [hereinafter *San Antonio ISD Indicator*], http://ritter.tea.state.tx.us/perfreport/aeis/2009/district.srch.html (accessed by searching for the relevant school district on the search engine).

109. *Id.* § II, at 1.

110. *Id.* § I, at 11-12.

A similar tale of two cities played out in the Houston area between integrated Katy ISD, where 7.8% of graduating students were black, 23.2% Hispanic, and 59.8% white,[111] and segregated Pasadena ISD, where 6.5% were black, 64.8% Hispanic, and 24.3% white.[112] At Katy, a "recognized" district with two "Gold Performance Acknowledgments," 91.8% of students graduated, with an average SAT score of 1080 and 60% college readiness in both English and Math.[113] At Pasadena, only 67.8% graduated; SAT test-takers achieved an average score of 928; and 40% were college-ready in both English and Math.[114]

The narrative repeats itself in the Dallas/Fort Worth metropolitan area. For example, Keller ISD, a large and "recognized" school district with four "Gold Performance Acknowledgements,"[115] is fairly integrated. 72.3% of

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111. *2008-09 Academic Indicator System, Katy ISD*, Tex. Educ. Agency, § II, at 1 [hereinafter *Katy ISD Indicator*], http://ritter.tea.state.tx.us/perfreport/aeis/2009/district.srch.html (accessed by searching for the relevant school district on the search engine).

112. *2008-09 Academic Indicator System, Pasadena ISD*, Tex. Educ. Agency, § II, at 1 [hereinafter *Pasadena ISD Indicator*], http://ritter.tea.state.tx.us/perfreport/aeis/2009/district.srch.html (accessed by searching for the relevant school district on the search engine).

113. *Katy ISD Indicator*, § I, at 11-12.

114. *Pasadena ISD Indicator*, § I, at 11-12.

115. *2008-09 Academic Indicator System, Keller ISD*, Tex. Educ. Agency, § II, at cover [hereinafter *Keller ISD Indicator*],

graduating students are white, 12.2% are Hispanic, and 7.3% are African-American.[116] The high school senior class of 2008 attained a graduation rate of 88.7% and an average SAT score of 1043, and 53% were college-ready in both English and Math.[117] The data for nearby Dallas ISD, one of the largest in the state with 157,174 students and 7,308 high school seniors,[118] shows a highly segregated school in stark contrast. There, black and Hispanic students make up 90.9% of the graduating class, and 86.1% of all students are economically disadvantaged.[119] Only 65.2% graduated high school; SAT test-takers achieved an average score of 856; and only 29% of graduating seniors were college-ready in both English and Math.[120]

The top decile of high schools in each of these districts—including large numbers of students from highly segregated, underfunded, and underperforming schools—all qualified for automatic admission to UT

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http://ritter.tea.state.tx.us/perfreport/aeis/2009/ district.srch.html (accessed by searching for the relevant school district on the search engine).

116. *Id.* § II, at 1.

117. *Id.* § I, at 11-12.

118. *2008-09 Academic Indicator System, Dallas ISD*, Tex. Educ. Agency, § II, at 1 [hereinafter *Dallas ISD Indicator*], http://ritter.tea.state.tx.us/perfreport/aeis/2009/district.srch.html (accessed by searching for the relevant school district on the search engine).

119. *Id.*

120. *Id.* § I, at 11-12.

Austin. That these students were able to excel in the face of severe limitations in their high school education and earn a coveted place in UT Austin's prestigious freshman class is to be commended. That other students are left out—those who fell outside their high school's top ten percent but excelled in unique ways that would enrich the diversity of UT Austin's educational experience—leaves a gap in an admissions process seeking to create the multi-dimensional diversity that *Bakke* envisions.

C

UT Austin's holistic review program—a program nearly indistinguishable from the University of Michigan Law School's program in *Grutter*—was a necessary and enabling component of the Top Ten Percent Plan by allowing UT Austin to reach a pool of minority and non-minority students with records of personal achievement, higher average test scores, or other unique skills. A variety of perspectives, that is differences in life experiences, is a distinct and valued element of diversity. Yet a significant number of students excelling in high-performing schools are passed over by the Top Ten Percent Plan although they could bring a perspective not captured by admissions along the sole dimension of class rank. For example, the experience of being a minority in a majority-white or majority-minority school and succeeding in that environment offers a rich pool of potential UT Austin students with demonstrated qualities of leadership and sense of self. Efforts to draw from this pool do not demean the potential of Top Ten admittees. Rather it complements their contribution to diversity—mitigating in an important way the effects of the single dimension process.

UT Austin persuades that this reach into the applicant pool is not a further search for numbers but a search for students of unique talents and backgrounds who can enrich the diversity of the student body in distinct ways including test scores, predicting higher levels of preparation and better prospects for admission to UT Austin's more demanding colleges and ultimately graduation. It also signifies that this is a draw from a highly competitive pool, a mix of minority and non-minority students who would otherwise be absent from a Top Ten Percent pool selected on class rank, a relative and not an independent measure across the pool of applicants.

VI

These realities highlight the difficulty of an approach that seeks to couch the concept of critical mass within numerical terms. The numbers support UT Austin's argument that its holistic use of race in pursuit of diversity is not about quotas or targets, but about its focus upon individuals, an opportunity denied by the Top Ten Percent Plan. Achieving the critical mass requisite to diversity goes astray when it drifts to numerical metrics. UT Austin urges that it has made clear that looking to numbers, while relevant, has not been its measure of success; and that its goals are not captured by population ratios. We find this contention proved, mindful that by 2011, Texas high school graduates were majority-minority.

UT Austin urges that its first step in narrow tailoring was the admission of over 80% of its Texas students though a facially race-neutral process, and that Fisher's

embrace of the sweep of the Top Ten Percent Plan as a full achievement of diversity reduces critical mass to a numerical game and little more than a cover for quotas. Fisher refuses to acknowledge this distinction between critical mass—the tipping point of diversity—and a quota. And in seeking to quantify "critical mass" as a rigid numerical goal, Fisher misses the mark. Fisher is correct that if UT Austin defined its goal of diversity by the numbers only, the Top Ten Percent Plan could be calibrated to meet that mark. To do so, however, would deny the role of holistic review as a necessary complement to Top Ten Percent admissions. We are persuaded that holistic review is a necessary complement to the Top Ten Percent Plan, enabling it to operate without reducing itself to a cover for a quota system; that in doing so, its limited use of race is narrowly tailored to this role—as small a part as possible for the Plan to succeed.

A

The Top Ten Percent Plan is dynamic, its take floating year to year with the number of Texas high school graduates in the top ten percent of their class that choose to capitalize on their automatic admission to the flagship university. Its impact on the composition of each incoming class predictably has grown dramatically, leaving ever fewer holistic review seats available for the growing demographic of Texas high school graduates. In 1996, when the Top Ten Percent Plan was introduced, it admitted 42% of the Texas incoming class; by 2005, when the *Grutter* plan was introduced, the Plan occupied 69% of the seats available to Texas residents; by 2008, when

Fisher applied for admission, it had swelled to 81%.[121] The increasing take of the Top Ten Percent Plan both enhanced its strengths and exacerbated its inherent weaknesses in composing the UT student body, as the overwhelming majority of seats was granted to students without the facial use of race but also without consideration of experiences beyond a single academic dimension. So as the take of the Top Ten Percent Plan grew, so also did the necessity of a complementary holistic admissions program to achieve the diversity envisioned by *Bakke*.

A quick glance in the public record of data since 2008 confirms that UT Austin's race-conscious holistic review program has a self-limiting nature, one that complements UT Austin's periodic review of the program's necessity to ensure it is limited in time. For the entering class of 2009, the year after Fisher applied for admission, the Top Ten Percent Plan's take of the seats available for Texas residents swelled to 86% and remained at 85% in 2010.[122]

This trend did not escape the Texas Legislature. Consistent with its long-standing view of holistic review as a crucial complement to the Top Ten Percent Plan, Texas passed Senate Bill 175 of the 81st Texas Legislature (SB

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121. In 1996, the Top Ten Percent Plan admitted 41.8% of the incoming class of Texas students; 36.6% in 1997; 41.1% in 1998; 44.9% in 1999; 47.4% in 2000; 51.3% in 2001; 54.4% in 2002; 70.4% in 2003; 66.3% in 2004; 68.7% in 2005; 71.4% in 2006; 70.6% in 2007; and 80.9% in 2008. *See 2006 Top Ten Percent Report* at 5 tbl.1a (data for years 1996-2005); *2008 Top Ten Percent Report* at 7 tbl.1a (data for 2006-2008).

122. *See 2010 Top Ten Percent Report* at 8 tbl.1a.

175) in 2009. SB 175 modified the Top Ten Percent Plan for UT Austin to authorize the University "to limit automatic admission to no less than 75% of its enrollment capacity for first-time resident undergraduate students beginning with admission for the entering class of 2011 and ending with the entering class of 2015."[123] Pursuant to SB 175, UT Austin restricted automatic admissions to the top 7% for Fall 2014 and Fall 2015 applicants, to the top 8% for Fall 2011 and Fall 2013 applicants, and to the top 9% for Fall 2012 applicants.[124] All remaining slots continue to be filled through holistic review.[125] For the entering class of 2011, the first affected by SB 175, 74% of enrolled Texas residents were automatically admitted (with a higher percentage of offers of admission), a figure that again was pushed upward by inherent population forces, to 77% for the entering Texas class of 2013.[126]

In the growing shadow of the Top Ten Percent Plan, there was a cautious, creeping numerical increase in minority representation following the inclusion of race

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123. William Powers, Jr., Univ. of Tex. at Austin, *Report to the Governor, the Lieutenant Governor, and the Speaker of the House of Representatives on the Implementation of SB 175*, at 4 (Dec. 31, 2011) [hereinafter *2011 Powers Report*], *available at* https://www.utexas.edu/student/admissions/research/SB_175_Report_for_2011.pdf.

124. *Automatic Admission*, Univ. of Tex. at Austin (Sept. 16, 2013, 2:56 PM), http://bealonghorn.utexas.edu/freshmen/decisions/automatic-admission.

125. *Id.*

126. *2013 Powers Report* at 29 tbl.4.1.

and ethnicity in the holistic review program, a testament, UT Austin says, to its race-conscious holistic review. We must agree. From 2004, the last facially race-neutral holistic review program year, to 2005, the first year that race and ethnicity were considered, the percentage of African-American students admitted to UT Austin climbed from 4.82% to 5.05%. The trend has continued since, climbing to 5.13% in 2006, 5.41% in 2007, and 5.67% in 2008. Similarly, the percentage of Hispanic admitted students climbed from 16.21% in 2004, to 17.88% in 2005, 18.08% in 2006, 19.07% in 2007, and 20.41% in 2008.[127] The modest numbers only validate the targeted role of UT Austin's use of *Grutter*. Nor can they be viewed as a pretext for quota seeking—an assertion of Fisher's belied by the reality that over this time frame graduating Texas high school seniors approached being majority-minority. The small increases do not exceed critical mass nor imply a quota but instead bring a distinct dimension of diversity to the Top Ten Percent Plan. To be sure, critical mass can be used as a cover for quotas and proportionality goals, but it is not inevitable; UT Austin persuades that viewed objectively, under its structure, its efforts in holistic review have not been simply to expand the numbers but rather the diversity of individual contributions.

Turning in the opposite direction from her claim of racial quotas, Fisher faults UT Austin's holistic use of race for its *de minimis* contribution to diversity. UT Austin replies that this turns narrow tailoring upside down. We agree. Holistic review allows selection of an overwhelming

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127. *2008 Top Ten Percent Report* at 6 tbl.1.

number of students by facially neutral measures and for the remainder race is only a factor of factors. Fisher's focus on the numbers of minorities admitted through the holistic gate relative to those admitted through the Top Ten Percent Plan is flawed, ignoring its role as a necessary complement to the Plan. The apt question is its contribution to the richness of diversity as envisioned by *Bakke* against the backdrop of the Top Ten Percent Plan. That is its palliative role claimed by UT Austin. So viewed, holistic review's low production of numbers is its strength, not its weakness.

In sum, Fisher points to the numbers and nothing more in arguing that race-conscious admissions were no longer necessary because a "critical mass" of minority students had been achieved by the time Fisher applied for admission—a head count by skin color or surname that is not the diversity envisioned by *Bakke* and a measure it rejected. In 2007, Fisher emphasizes, there were 5.8% African-American and 19.7% Hispanic enrolled students, which exceeds pre-*Hopwood* levels and the minority enrollment at the University of Michigan Law School examined in *Grutter*. But an examination that looks exclusively at the percentage of minority students fails before it begins. Indeed, as *Grutter* teaches, an emphasis on numbers in a mechanical admissions process is the most pernicious of discriminatory acts because it looks to race alone, treating minority students as fungible commodities that represent a single minority viewpoint. Critical mass, the tipping point of diversity, has no fixed upper bound of universal application, nor is it the minimum threshold at which minority students do not feel isolated or like

spokespersons for their race. *Grutter* defines critical mass by reference to a broader view of diversity rather than by the achievement of a certain quota of minority students. Here, UT Austin has demonstrated a permissible goal of achieving the educational benefits of diversity within that university's distinct mission, not seeking a percentage of minority students that reaches some arbitrary size.

Implicitly conceding the need for holistic review, Fisher offers socioeconomic disadvantage as a race-neutral alternative in holistic review. UT Austin points to widely accepted scholarly work concluding that "there are almost six times as many white students as black students who both come from [socio-economically disadvantaged] families and have test scores that are above the threshold for gaining admission at an academically selective college or university."[128] At bottom, the argument is that minority students are disadvantaged by class, not race; the socioeconomic inquiry is a neutral proxy for race. *Bakke* accepts that skin color matters—it disadvantages and ought not be relevant but it is. We are ill-equipped to sort out race, class, and socioeconomic structures, and *Bakke* did not undertake to do so. To the point, we are ill-equipped to disentangle them and conclude that skin color is no longer an index of prejudice; that we would will it does not make it so.

We are satisfied that UT Austin has demonstrated that race-conscious holistic review is necessary to make the Top Ten Percent Plan workable by patching the

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128. Supp. Br. of Appellee at 30 (citing William G. Bowen & Derek Bok, *The Shape of the River* 51 (1998)).

holes that a mechanical admissions program leaves in its ability to achieve the rich diversity that contributes to its academic mission—as described by *Bakke* and *Grutter*.

B

Over the history of holistic review, its intake of students has declined, minority and non-minority, and changed the profile of the students it admits—the growing number of applicants and increasing take of the Top Ten Percent Plan raises the competitive bar each year, before race is ever considered, for the decreasing number of seats filled by holistic review. Those admitted are those that otherwise would be missed in the diversity mix— for example, those with special talents beyond class rank and identifiable at the admission gate, and minorities with the experience of attending an integrated school with better educational resources.

The data also show that white students are awarded the overwhelming majority of the highly competitive holistic review seats. As we have explained and as shown in Appendix 2, the increasing take of the Top Ten Percent Plan is inherently self-limiting. UT Austin has demonstrated that it is on a path that each year reduces the role of race. After the Top Ten Percent Plan swallowed 81% of the seats available for Texas students in 2008, for example, white Texan students admitted through holistic review occupied an additional 12% of the overall seats. Only 2.4% and 0.9% of the incoming class of Texas high school graduates were Hispanic and black students admitted through holistic review. That is, admission via the holistic review program—overwhelmingly and disproportionally

of white students—is highly competitive for minorities and non-minorities alike. These data persuade us of the force of UT Austin's argument that a limited use of race is necessary to target minorities with unique talents and higher test scores to add the diversity envisioned by *Bakke* to the student body.

Numbers are not controlling but they are relevant to UT Austin's claimed need for holistic review as a necessary component of its admission program. In 2005, the first class that included race and ethnicity in holistic review, 176 (29%) of 617 total African-American admitted students were admitted via holistic review.[129] Following years were similar, with 32% of admitted African-Americans in 2006, 35% in 2007, and 20% in 2008.[130] Likewise, significant percentages of Hispanic admitted students were admitted through the holistic review program, making up 24% of the admitted Hispanic pool in 2005, 26% in 2006, 25% in 2007, and 15% in 2008.[131] These numbers directly support UT Austin's contention that holistic use of race plays a necessary role in enabling it to achieve diversity while admitting upwards of 80% of its Texas students by facially neutral standards, drawing as it does from a pool not measured solely by class rank in largely segregated schools.

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129. *See 2008 Top Ten Percent Report* at 8 tbl.2 (providing the percentage of students admitted through the Top Ten Percent Plan by racial and ethnic background).

130. *Id.*

131. *Id.*

Appendix A

C

Recall the 3.5 AI threshold that excluded Fisher. Holistic review for the colleges to which Fisher applied only admitted applicants—minority or non-minority—with a minimum AI score of 3.5. This effectively added to the mix a pool of applicants from which those colleges could admit students with higher test scores and a higher predicted level of performance, despite being outside the top ten percent of their class, as part of a greater mosaic of talents. Insofar as some dispersion of minority students among many classes and programs is important to realizing the educational benefits of diversity, race-conscious holistic review is a necessary complement to the Top Ten Percent Plan by giving high-scoring minority students a better chance of gaining admission to UT Austin's competitive academic departments. Fisher's proffered solution is for UT Austin's more competitive academic programs to lower their gates. But this misperceives the source of the AI threshold for admission into the competitive colleges: These programs fill 75% of their seats from the pool of students automatically admitted under the Top Ten Percent Plan. The large number of holistic review candidates competing for the quarter of the remaining seats dictates the high AI threshold that all applicants—minority or non-minority—must meet to qualify for admission. Fisher also points to weak dispersal across classes as evidence of UT Austin's pursuit of numbers. It is precisely the opposite. We repeat, holistic review's search is for diversity, as envisioned by *Bakke*, one benefit of which is its attendant mitigation of the clustering tendencies of the Top Ten Percent Plan.

Fisher responds that, even if necessary, UT Austin could never narrowly tailor a program that achieves classroom diversity. In particular, Fisher suggests that it is impossible to obtain classroom-level diversity without some sort of fixed curriculum or lower school- or major-level standards. This argument again misses the mark by defining diversity only by numbers. UT Austin does not suggest that the end point of this exercise is a specific measure of diversity in every class or every major. Instead, such measures are relevant but not determinative signals of a want of the array of skills needed for diversity. In other words, diversity in the student body surely produces a degree of intra-classroom and intra-major diversity, with the "important and laudable" benefit recognized in *Grutter* of "classroom discussion [being] livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds."[132] When the holistic review program was modified to be race-conscious, 90% of classes had one or zero African-American students, 46% had one or zero Asian-American students, and 43% had one or zero Hispanic students.[133] This represented a decreasing degree of minority classroom dispersion since the adoption of the Top Ten Percent Plan. This does not mean that there will be some set percentage of African-American nuclear physics majors. But this does mean that UT Austin's effort to ensure that African-American students with a broad array of skills are in the mix is both permissible and necessary.

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132. *Grutter*, 539 U.S. at 330 (quotation marks and citation omitted).

133. *See* Defs.' Cross-Mot. Summ. J., Ex. Tab 11 to App., Walker Aff. at ¶ 11, *Fisher*, 645 F. Supp. 2d 587 (No. 08-263), ECF No. 96.

VII

Interlacing the Top Ten Percent Plan, with its dependence upon segregated schools to produce minority enrollment, with a plan that did not consider race until it had a universe of applicants clearing a high hurdle of demonstrated scholastic performance strongly supports UT Austin's assertion that its packaging of the two was necessary in its pursuit of diversity. This hurdle is a product of a growing number of applicants competing for an ever-shrinking number of holistic review seats, creating one of the most competitive admissions processes in the country. And when race enters it is deployed in the holistic manner of *Grutter* as a factor of a factor. Even then the minority student that receives some boost for her race will have survived a fierce competition. These minorities are in a real sense, along with the non-minorities of this universe, overlooked in a facially neutral Top Ten Percent Plan that considers only class rank. While outside the Top Ten Percent Plan's reach, they represent both high scholastic potential and high achievement in majority-white schools. We are persuaded that their absence would directly blunt efforts for a student body with a rich diversity of talents and experiences.

"Context matters when reviewing race-based governmental action under the Equal Protection Clause,"[134] and UT Austin's admissions program is a unique creature. "[S]trict scrutiny must take relevant differences into account"—[i]ndeed, as [the Court has]

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134. *Grutter*, 539 U.S. at 327 (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 343-44, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960)).

explained, that is its fundamental purpose."[135] The precise context of UT Austin's admissions demonstrates that Fisher's charge is belied by this record. Her argument refuses to accept the admission of over 80% of its Texas students without facial consideration of race as any part of narrow tailoring, and critically refuses to accept that the process adopted for the remaining 20% is essential. It rests on the untenable premise that a *Grutter* plan for 100% of the admissions is to be preferred. UT Austin's efforts to achieve diversity without facial consideration of race, its narrow tailoring of its admission process, in one of the country's largest states, offers no template for others.

VIII

In sum, it is suggested that while holistic review may be a necessary and ameliorating complement to the Top Ten Percent Plan, UT Austin has not shown that its holistic review need include any reference to race, this because the Plan produces sufficient numbers of minorities for critical mass. This contention views minorities as a group, abjuring the focus upon individuals—each person's unique potential. Race is relevant to minority and non-minority, notably when candidates have flourished as a minority in their school—whether they are white or black. *Grutter* reaffirmed that "[j]ust as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race still

135. *Id.* (internal quotation marks and citations omitted).

matters." We are persuaded that to deny UT Austin its limited use of race in its search for holistic diversity would hobble the richness of the educational experience in contradiction of the plain teachings of *Bakke* and *Grutter*. The need for such skill sets to complement the draws from majority-white and majority-minority schools flows directly from an understanding of what the Court has made plain diversity is not. To conclude otherwise is to narrow its focus to a tally of skin colors produced in defiance of Justice Kennedy's opinion for the Court which eschewed the narrow metric of numbers and turned the focus upon individuals. This powerful charge does not deny the relevance of race. We find force in the argument that race here is a necessary part, albeit one of many parts, of the decisional matrix where being white in a minority-majority school can set one apart just as being a minority in a majority-white school—not a proffer of societal discrimination in justification for use of race, but a search for students with a range of skills, experiences, and performances—one that will be impaired by turning a blind eye to the differing opportunities offered by the schools from whence they came.

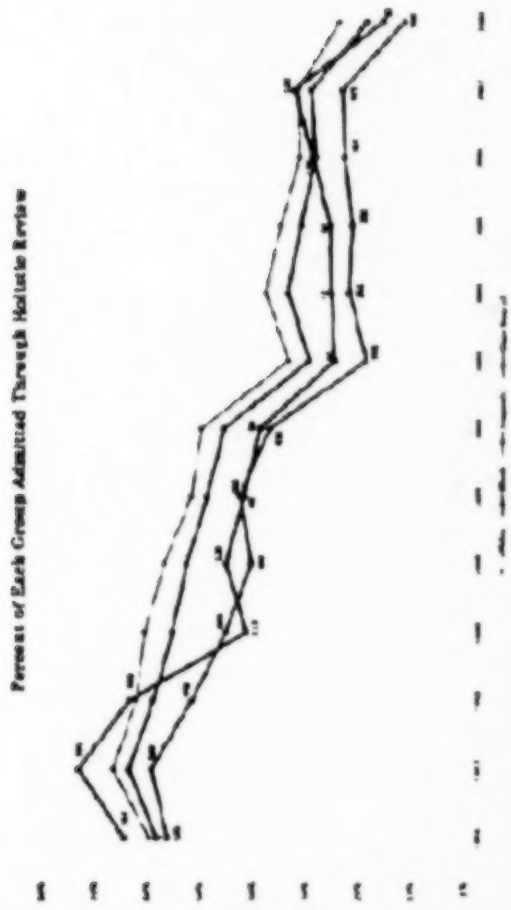
It is settled that instruments of state may pursue facially neutral policies calculated to promote equality of opportunity among students to whom the public schools of Texas assign quite different starting places in the annual race for seats in its flagship university. It is equally settled that universities may use race as part of a holistic admissions program where it cannot otherwise achieve diversity. This interest is compelled by the reality that university education is more the shaping of lives than the

filling of heads with facts—the classic assertion of the humanities. Yet the backdrop of our efforts here includes the reality that accepting as permissible policies whose purpose is to achieve a desired racial effect taxes the line between quotas and holistic use of race towards a critical mass. We have hewed this line here, persuaded by UT Austin from this record of its necessary use of race in a holistic process and the want of workable alternatives that would not require even greater use of race, faithful to the content given to it by the Supreme Court. To reject the UT Austin plan is to confound developing principles of neutral affirmative action, looking away from *Bakke* and *Grutter*, leaving them in uniform but without command—due only a courtesy salute in passing.

For these reasons, we AFFIRM.

Appendix A

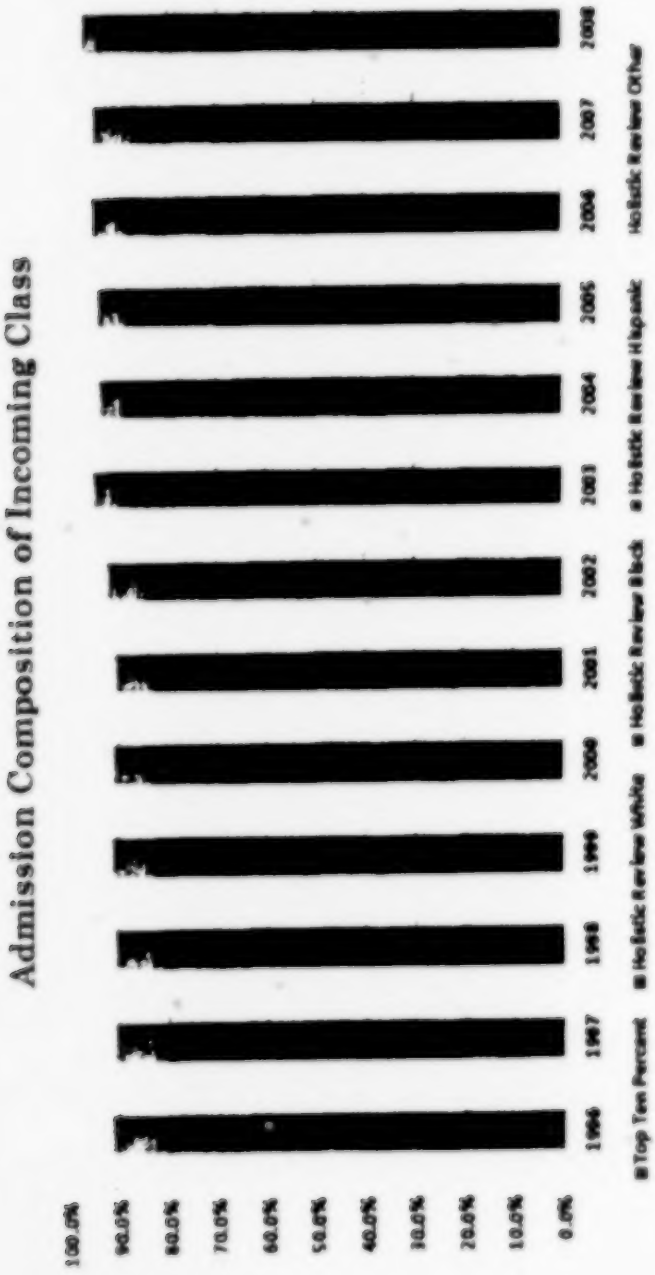
Appendix 1[136]



136. Data for 1996-2005 comes from the *2006 Top Ten Percent Report* at 15-24 tbl.7a-7j. Data for 2006 comes from the *2007 Top Ten Percent Report*. *See* Office of Admissions, Univ. of Tex. at Austin, *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin: Demographic Analysis of Entering Freshmen Fall 2007 and Academic Performance of Top 10% and Non-Top 10% Students Academic Years 2002-2006 (Report 10)*, at 20 tbl.7e (Oct. 28, 2007), *available at* http://www.utexas.edu/student/admissions/research/HB588-Report10.pdf. Data for 2007 comes from the *2008 Top Ten Percent Report* at 16 tbl.7. Data for 2008 comes from the *2009 Top Ten Percent Report* at 15 tbl.7.

Appendix A

Appendix 2[137]



137. *See supra* note 136.

Appendix A

EMILIO M. GARZA, Circuit Judge, dissenting:

In vacating our previous opinion, *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011), the Supreme Court clarified the strict scrutiny standard as it applies to cases involving racial classifications in higher education admissions: Now, reviewing courts cannot defer to a state actor's argument that its consideration of race is narrowly tailored to achieve its diversity goals. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420, 186 L. Ed. 2d 474 (2013). Although the University has articulated its diversity goal as a "critical mass," surprisingly, it has failed to define this term in any objective manner. Accordingly, it is impossible to determine whether the University's use of racial classifications in its admissions process is narrowly tailored to its stated goal—essentially, its ends remain unknown.

By holding that the University's use of racial classifications is narrowly tailored, the majority continues to defer impermissibly to the University's claims. This deference is squarely at odds with the central lesson of *Fisher*. A proper strict scrutiny analysis, affording the University "no deference" on its narrow tailoring claims, compels the conclusion that the University's race-conscious admissions process does not survive strict scrutiny.

I

As a preliminary matter, Fisher has standing to pursue this appeal, but not because, as the majority contends, the Supreme Court's opinion does "not allow our reconsideration [of the issue of standing]." *Ante*, at 6.

Federal courts have an affirmative duty to verify jurisdiction before proceeding to the merits. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). Although standing was actively contested before the Supreme Court, and although the Court's opinion is silent about the issue,[1] the Supreme Court has specifically warned against inferring jurisdictional holdings from its opinions not explicitly addressing that subject. *See Steel Co.*, 523 U.S. at 91. Accordingly, the issue of standing remains open, and this court is obliged to address it. *Id.* at 94-95.

In our previous opinion, we held that Fisher had standing to "challenge [her] rejection and to seek money damages for [her] injury." *Fisher*, 631 F.3d at 217. Only one relevant fact has changed since then—in 2012, Fisher graduated from Louisiana State University. The University contends that by graduating, "her forward-looking request for relief became moot" because she could no longer seek reconsideration of her undergraduate application. Fisher's graduation does not alter our previous standing analysis because, as she correctly observes, that determination did not depend on a claim for forward-looking injunctive relief. *Id.* We held that Fisher had standing to seek nominal monetary damages, and we should reach the same conclusion now.

The University relies on *Texas v. Lesage*, 528 U.S. 18, 120 S. Ct. 467, 145 L. Ed. 2d 347 (1999) (per curiam),

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1. As is Justice Scalia's concurrence, *Fisher*, 133 S. Ct. at 2422, Justice Thomas's concurrence, *id.* at 2422-32, and Justice Ginsburg's dissent, *id.* at 2432-34.

for the proposition that Fisher lacks standing because she would not have been admitted regardless of her race. But even if *Lesage* is a standing case (which is a debatable premise—the case seems to address statutory liability under § 1983), it does not affect the outcome here. *Lesage* stands for the proposition that a plaintiff challenging governmental use of racial classifications cannot prevail if "it is *undisputed* that the government would have made the same decision regardless" of such use. *Id.* at 21 (emphasis added). The University asserts that Fisher would not have been admitted even if she had a "perfect" PAI score. The majority agrees. *Ante*, at 5 ("If [Fisher] had been a minority the result would have been the same."). While Fisher would have been denied admission during the 2008 admissions cycle even if she had a top PAI score, this is not the relevant inquiry. Rather, as Fisher explains, the proper question is whether she would have fallen above the admissions cut-off line if that line had been drawn on a race-neutral distribution of *all* applicants' scores. This record does not indicate whether Fisher would have been admitted if race were removed from the admissions process altogether. At the least, this is a complex question that is far from "undisputed." *See Lesage*, 528 U.S. at 21. Even the University acknowledges that the answer to this question is practically unknowable: It concedes that re-engineering the 2008 admissions process by retroactively removing consideration of race is virtually impossible since race has an immeasurable, yet potentially material, impact on the placement of the final admissions cut-off lines for all programs. In sum, the record does not show that Fisher's rejection under a race-neutral admissions process is "undisputed," and remanding to the district court could not alter the record in this regard.

The University further challenges Fisher's standing on redressability grounds. The University's theory is that even if Fisher had been admitted through the race-conscious admissions program, and had not suffered the injury of rejection, she still would have paid the non-refundable application fee. Thus, says the University, because the application fee has no causal link to her injury, any judicial relief would fail to provide redress. This argument misconstrues the nature of Fisher's alleged injury—it is not her rejection, but the denial of equal protection of the laws during the admissions decision process. Fisher correctly explains that the application fee represents nominal damages for the alleged constitutional harm stemming from the University's improper use of racial classifications.[2] Because this harm would have befallen Fisher whether or not she was ultimately admitted to the University, the non-refundable nature of the application fee is irrelevant.[3]

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2. *See Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986) ("[N]ominal damages, and not damages based on some undefinable 'value' of infringed rights, are the appropriate means of 'vindicating' rights whose deprivation has not caused actual, provable injury."); *Devbrow v. Kalu*, 705 F.3d 765, 769 (7th Cir. 2013) ("[N]ominal damages are available as a remedy . . . [for an abstract injury].").

3. The University's argument that *Arizonans for Official English v. Arizona*, 520 U.S. 43, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997) governs Fisher's nominal monetary damages claim is without merit. Fisher does not rely solely on a "general prayer for relief" to save a case otherwise falling outside an Article III case or controversy from dismissal. *Id.* at 71. Fisher's original complaint specifically requested monetary damages.

II

Having confirmed our jurisdiction, our task is to apply strict scrutiny without any deference to the University's claims. Because *Fisher* effected a change in the law of strict scrutiny, and corrected our understanding of that test as applied in *Grutter v. Bollinger*, 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003), I first review the current principles governing this "searching examination." *Fisher*, 133 S. Ct. at 2420.

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. It is canonical that the Constitution treats distinctions between citizens based on their race or ethnic origin as suspect, *see, e.g., Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S. Ct. 693, 98 L. Ed. 884 (1954), and that the Equal Protection Clause "demands that racial classifications . . . be subjected to the most rigid scrutiny," *Loving v. Virginia*, 388 U.S. 1, 11, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967). Thus, strict scrutiny begins from the fundamental proposition that "any official action that treats a person differently on account of his race or ethnic origin is inherently suspect." *Fullilove v. Klutznick*, 448 U.S. 448, 523, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980) (Stewart, J., dissenting). This is "because racial characteristics so seldom provide a relevant basis for disparate treatment." *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989). "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people."

Fisher, 133 S. Ct. at 2418 (quoting *Rice v. Cayetano*, 528 U.S. 495, 517, 120 S. Ct. 1044, 145 L. Ed. 2d 1007 (2000)).

When a state university makes race-conscious admissions decisions, those decisions are governed by the Equal Protection Clause, even though they may appear well-intended. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 297, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978) (opinion of Powell, J.). Simply put, the Constitution does not treat race-conscious admissions programs differently because their stated aim is to help, not to harm.

Under strict scrutiny, a university's use of racial classifications is constitutional only if necessary and narrowly tailored to further a compelling governmental interest. *See Grutter*, 539 U.S. at 326. It is well-established that there is a compelling governmental interest in obtaining the educational benefits of a diverse student body. *See Bakke*, 438 U.S. at 311-12 (holding that the "attainment of a diverse student body" is a "constitutionally permissible goal for an institution of higher education"). *Grutter* and *Gratz v. Bollinger*, 539 U.S. 244, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003), confirmed this. *See Fisher*, 133 S. Ct at 2418.[4] "The diversity that furthers a compelling [governmental] interest encompasses a far broader array of qualifications and characteristics

4. These principles are not challenged in this case. *See infra* note 8. However, I continue to believe that *Grutter's* discussion of the "educational benefits of diversity," drawing directly from the principles established in *Bakke*, "remains suspended at the highest levels of hypothesis and speculation," *Fisher*, 631 F.3d at 255 (Garza, J., specially concurring).

of which racial or ethnic origin is but a single though important element." *Bakke*, 438 U.S. at 315. Thus, diversity cannot be defined by a "specified percentage of a particular group," *id.* at 307, because such a definition would be "patently unconstitutional racial balancing," *Grutter*, 539 U.S. at 330. In applying strict scrutiny, it is proper for courts to defer to a university's decision to pursue the compelling governmental interest of diversity based on its "educational judgment that such diversity is essential to its educational mission." *Id.* at 328. But, deference to the University is appropriate on this point, and this point alone. *Fisher*, 133 S. Ct. at 2421.

Once a university has decided to pursue this compelling governmental interest, it must prove that the means chosen "to attain diversity are narrowly tailored to that goal." *Fisher*, 133 S. Ct. at 2420. In this, the strict scrutiny test takes the familiar form of a "means-to-ends" analysis: The compelling governmental interest is the ends, and the government program or law—here, the University's race-conscious admissions program—is the means. Strict scrutiny places the burden of proving narrow tailoring firmly with the government. *See Johnson v. California*, 543 U.S. 499, 505, 125 S. Ct. 1141, 160 L. Ed. 2d 949 (2005). And, furthermore, narrow tailoring must be established "with clarity." *Fisher*, 133 S. Ct. at 2418.

Before this case, the Supreme Court had issued only three major decisions addressing affirmative action in higher education admissions: *Bakke*, *Gratz*, and *Grutter*. In *Fisher*, the Court made clear that this line of cases does not stand apart from "broader equal protection

jurisprudence." *Id.* at 2418. Rather, "the analysis and level of scrutiny applied to determine the validity of [a racial classification] do not vary simply because the objective appears acceptable . . . ." *Id.* at 2421 (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 n.9, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982)).

In *Fisher*, the Supreme Court modified the narrow tailoring calculus applied in higher education affirmative action cases. While the overarching principles from *Bakke*, *Gratz*, and *Grutter*—that a university can have a compelling interest in attaining the educational benefits of diversity, and that its admissions program must be narrowly tailored to serve this interest—were taken "as given," *id.* at 2417-18, the *Fisher* Court altered the application of those principles in a critical way. Now, courts must give "no deference," to a state actor's assertion that its chosen "means . . . to attain diversity are narrowly tailored to that goal." *Id.* at 2420. In so doing, the *Fisher* Court embraced Justice Kennedy's position on "deference" from *Grutter*.[5] Thus, under the current principles

5. *See Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting) ("[T]he majority proceeds to nullify . . . rigorous judicial review, with strict scrutiny as the controlling standard . . . . The Court confuses deference to a university's definition of its educational objective with deference to the implementation of this goal."). I agree with the majority that *Fisher* represents a decisive shift in the law. *See ante*, at 10 ("Bringing forward Justice Kennedy's dissent in *Grutter*, the Supreme Court faulted the district court's and this Court's review of UT Austin's means to achieve the permissible goal of diversity . . . ."); *see also* Erwin Chemerinsky, *The Court Affects Each of Us*, 16 Green Bag 2d 361, 364 (2013) ("[*Fisher*] adopts a tougher, less sympathetic tone when it comes

governing review of race-conscious admissions programs, providing any deference to a state actor's claim that its use of race is narrowly tailored is "antithetical to strict scrutiny, not consistent with it." *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting).

Because the higher-education affirmative action cases do not stand apart from "broader equal protection jurisprudence," *Fisher*, 133 S. Ct. at 2418, strict scrutiny must be applied with the same analytical rigor deployed in those other contexts. Put simply, there is no special form of strict scrutiny unique to higher education admissions decisions. Accordingly, we must now evaluate narrow tailoring by ensuring that "the means chosen 'fit' the [compelling governmental interest] so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson*, 488 U.S. at 493.[6] Narrow tailoring further requires that "the reviewing court verify that it is necessary for a university to use race to achieve the educational benefits of diversity." *Fisher*, 133 S. Ct. at 2420 (internal citations and quotations omitted). To do so, we must carefully

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to affirmative action programs. For example, in *Grutter*, the Court spoke of the need to defer to the judgment of colleges and universities. In *Fisher*, the Court said that such deference was appropriate only as to the importance of diversity; there is no deference given as to whether race is necessary to achieve it.").

6. We need not determine whether the "strong basis in evidence" test from *Croson* applies in this case. *See Croson*, 488 U.S. at 510. Even without this test, the University fails to carry its strict scrutiny burden of proving that its race-conscious admissions policy is necessary to further its diversity interest.

inquire into whether the University "could achieve sufficient diversity without using racial classifications." *Id.* Establishing narrow tailoring does not require the University to show that it exhausted every possible race-neutral option, but it must meet its "ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice." *Id.*

Of course, all of the above must be underscored by the principle that using racial classifications is permissible only as a "last resort to achieve a compelling interest." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 790, 127 S. Ct. 2738, 168 L. Ed. 2d 508 (2007) (Kennedy, J., concurring).[7]

III

Here, the University has framed its goal as obtaining a "critical mass" of campus diversity. To uphold the use of race under strict scrutiny, courts must find narrow tailoring through a close "fit" between this goal and the

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7. Notwithstanding the majority's brief discussion of *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 188 L. Ed. 2d 613 (2014), *ante* at 25, that case "is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education," and does not impact the analysis in today's case. *Schuette*, 134 S. Ct. at 1630.

admissions program's consideration of race.[8] Accordingly, the controlling question becomes the definition of "critical mass"—the University's stated goal. In order for us to determine whether its use of racial classifications in the admissions program is narrowly tailored to its goal, the University must explain its goal, and do so "with clarity." *Fisher*, 133 S. Ct. at 2418. On this record, it has not done so.

The majority entirely overlooks the University's failure to define its "critical mass" objective for the purposes of assessing narrow tailoring. This is the crux of this case—absent a meaningful explanation of its desired ends, the University cannot prove narrow tailoring under its strict scrutiny burden. Indeed, the majority repeatedly invokes the term "critical mass" without even questioning its definition. *See, e.g., ante*, at 23 ("But minority representation then remained largely stagnant, within a narrow oscillating band, rather than moving towards a critical mass of minority students."); *id.* at 30 ("Achieving the critical mass requisite to diversity goes astray when it drifts to numerical metrics."); *id.* ("Fisher refuses to acknowledge this distinction between critical mass—the tipping point of diversity—and a quota."); *id.* at 34 ("Critical mass, the tipping point of diversity, has no fixed upper bound of universal application, nor is it the

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8. The University's decision to pursue the educational benefits of diversity, as established in *Bakke*, is not challenged in this case. *See Fisher*, 133 S. Ct. at 2419 ("[T]he parties here do not ask the Court to revisit that aspect of *Grutter*'s holding."). Our only concern is whether the University's means—its race-conscious holistic admissions program—are narrowly tailored to its diversity objective.

minimum threshold at which minority students do not feel isolated or like spokespersons for their race."). Under *Fisher*, it is not enough for a court to simply state, as does the majority, that it is not deferring to the University's narrow tailoring arguments. *See, e.g., id.*, at 17 ("Affording no deference, we look for narrow tailoring . . . ."). Rather, the reviewing court's actual analysis must demonstrate that "no deference" has been afforded. *Fisher*, 133 S. Ct. at 2420. Here, the majority's failure to make a meaningful inquiry into the nature of "critical mass" constitutes precisely such deference.

Certainly, as explained below, I agree that "critical mass" does not require a precise numerical definition. *See infra* note 11. But, to meet its narrow tailoring burden, the University must explain its goal to us in some meaningful way. We cannot undertake a rigorous ends-to-means narrow tailoring analysis when the University will not define the ends. We cannot tell whether the admissions program closely "fits" the University's goal when it fails to objectively articulate its goal. Nor can we determine whether considering race is necessary for the University to achieve "critical mass," or whether there are effective race-neutral alternatives, when it has not described what "critical mass" requires.[9]

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9. There is some dispute about whether the University's definition of "critical mass" is even before us as part of our narrow tailoring analysis. The University claims that this issue is outside the scope of the Supreme Court's remand because it is relevant only to its compelling interest in diversity. This contention misunderstands the way in which "critical mass" matters to this case. Here, "critical mass" represents the goal

At best, the University's attempted articulations of "critical mass" before this court are subjective, circular, or tautological. *See infra* Part III.A. The University explains only that its "concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce." And, in attempting to address when it is likely to achieve critical mass, the University explains only that it will "cease its consideration of race when it determines . . . that the educational benefits of diversity can be achieved at UT through a race-neutral policy . . . ." These articulations are insufficient. Under the rigors of strict scrutiny, the judiciary must "verify that it is necessary for a university to use race to achieve the educational benefits of diversity." *Fisher*, 133 S. Ct. at 2420 (internal quotations omitted). It is not possible to perform this function when the University's objective is unknown, unmeasurable, or unclear.

The exacting scrutiny required by the Supreme Court's "broader equal protection jurisprudence" is entirely absent from today's opinion, which holds that

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the University purports to seek. The University uses this term as a representation of its ends. *Fisher* clearly establishes that reviewing courts must defer to the University's decision to pursue such ends. 133 S. Ct. at 2419. But, it equally establishes that we cannot defer to the University's claim that "the means chosen . . . to attain diversity are narrowly tailored to that goal." *Id.* at 2420. To conduct our own independent assessment of narrow tailoring—the judicial role under strict scrutiny—we must have a clear and definite understanding of the goal the University actually seeks. Accordingly, we must question the University's explanation of "critical mass" to fulfill the task remanded to us by the Supreme Court.

the University has proven narrow tailoring even though it has failed to meaningfully articulate its diversity goals.

A

The University's failure to define meaningfully its "critical mass" objective is manifest in its various strict scrutiny arguments. The University claims that its use of racial classifications is necessary and narrowly tailored because (1) quantitative metrics reflect an inadequate minority presence; (2) qualitative diversity is lacking; (3) certain selective colleges are insufficiently diverse; (4) its periodic review demonstrates that its goals have not yet been achieved; and (5) its use of racial classifications is almost identical to that approved in *Grutter*.[10] Each of these arguments falls short—either overlooking a more narrowly tailored alternative or eliding any articulation of *how* this specific use of racial classification advances the University's objective.

1

First, while not defining its "critical mass" goal with reference to specific quantitative objectives, the University claims that quantitative metrics are relevant in measuring its progress. The University "based its critical

10. On remand, the University does not specifically delineate these arguments as such. Rather, it submits that these various considerations are sufficient to establish narrow tailoring. In any event, whether taken together or evaluated individually, none of these arguments establishes that the University's use of racial classifications in its admissions decisions is narrowly tailored.

mass determination on several data points, including hard data on minority admissions, enrollment, and racial isolation" and found that its use of racial classifications "does increase minority enrollment."[11] Accepting that such metrics bear some relevance to the University's progress, this is insufficient to satisfy strict scrutiny. The University does not explain how admitting a very small number of minority applicants under the race-conscious admissions plan is necessary to advancing its diversity goal.

It is undeniable that the University admits only a small number of minority students under race-conscious holistic review. *See Fisher*, 631 F.3d at 262-63 (Garza, J., specially concurring). In 2008, the sole year at issue in this case, less than 20% of the class was evaluated under the race-conscious holistic review process. Even if we assume that all minority students who were admitted and enrolled in that year through the race-conscious holistic review process gained admission because of their race, this number is strikingly small—only 216 African-American and Hispanic students in an entering class of 6,322.[12] The University fails to explain *how* this small

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11. I agree with the majority's rejection of Fisher's arguments that the University had achieved "critical mass" in 2004, and that "critical mass" can be defined with reference to numbers alone. Fisher effectively asks us to ratify racial quotas, which we cannot, and will not, do. *See Bakke*, 438 U.S. at 317-18 (disapproving quota systems and approving the use of race or ethnic background as a "plus" factor).

12. Notwithstanding the University's contention that 2008 witnessed an "unprecedented surge" in Top Ten Percent Law admissions, this is the only relevant year for purposes of

group contributes to its "critical mass" objective. "Racial classifications are simply too pernicious to permit any but the *most exact* connection between justification and [racial] classification." *Adarand*, 515 U.S. at 236 (emphasis added). But here, the University has not established a clear and definite connection between its chosen means and its desired ends of "critical mass."

To be clear, I agree that a race-conscious admissions plan need not have a "dramatic or lopsided impact" on minority enrollment numbers to survive strict scrutiny, as the University reads Fisher's arguments to suggest. But neither can the University prove the *necessity* of its racial classification without meaningfully explaining *how* a small, marginal increase in minority admissions is necessary to achieving its diversity goals. Thus, neither the small (and decreasing) percentage of minority holistic-review admittees, nor minorities' "under-representation" in holistic review admissions relative to whites, taken alone, demonstrates narrow tailoring. *See ante*, at 17-18 & Appendix 1 (explaining that white students comprise a larger percentage of holistic review admittees than of the incoming class as a whole).[13]

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our narrow tailoring analysis. Moreover, I continue to find the majority's use of data for both enrolled and admitted students to be misguided and potentially confusing. *See ante*, at 35-37. In my view, the proper metric is enrolled students because we are assessing whether the University's means are narrowly tailored to its goal of attaining "the educational benefits of diversity" on campus. *See Fisher*, 631 F.3d at 260 n.18 (Garza, J., specially concurring).

13. For example, for the incoming class that enrolled in 2008, white students comprised 65% of all students admitted through holistic review, but only 52% of the entire incoming class.

Appendix A

Under the Equal Protection Clause, diversity cannot be assessed by strictly quantitative metrics, and, to the extent that numbers could be relevant in assessing "critical mass," the University leaves this relevance entirely unexplained.

2

The University advances a second understanding of "critical mass," which I will refer to as "qualitative." Under this theory, the University says its goal is not boosting minority enrollment numbers alone, but rather promoting the *quality* of minority enrollment—in short, diversity within diversity. The University submits that its race-conscious holistic review allows it to select for "other types of diversity" beyond race alone, and to identify the most "talented, academically promising, and well-rounded" minority students. According to the University, these are crucial "change agents" who debunk stereotypes but who may fall outside the top 10% of their high school classes.

As a preliminary matter, these stated ends are too imprecise to permit the requisite strict scrutiny analysis. The University has not provided any concrete targets for admitting more minority students possessing these unique qualitative-diversity characteristics—that is, the "other types of diversity" beyond race alone. At what point would this qualitative diversity target be achieved? Because its ends are unknown to us, the University cannot meet its strict scrutiny burden.

But, even accepting the University's broad and generic qualitative diversity ends, we cannot conclude that the

race-conscious policy is constitutionally "necessary." The University has not shown that qualitative diversity is absent among the minority students admitted under the race-neutral Top Ten Percent Law, Tex. Educ. Code Ann. § 51.803 (West 2009). That is, the University does not evaluate the diversity present in this group before deploying racial classifications to fill the remaining seats. The University does not assess whether Top Ten Percent Law admittees exhibit sufficient diversity within diversity, whether the requisite "change agents" are among them, and whether these admittees are able, collectively or individually, to combat pernicious stereotypes. There is no such evaluation despite the fact that Top Ten Percent Law admittees also submit applications with essays, and are even assigned PAI scores for purposes of admission to individual schools.[14] Evaluating the composition of these admittees—80% of the class in 2008—before deploying racial classifications in the holistic admissions program might well reveal that racial classifications are not necessary to achieve the University's qualitative diversity goals. *See Fisher*, 133 S. Ct. at 2420; *see also Parents Involved*, 551 U.S. at 790 (explaining that racial classifications must be a "last resort to achieve a compelling interest" in order to survive strict scrutiny) (Kennedy, J., concurring).

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14. Dr. Kedra Ishop, Associate Director of Admissions, explained that all applicant files are assigned an AI and PAI, and that the AI and PAI of a Top Ten Percent Law applicant can still determine the program to which she is admitted, if her class rank is not high enough for automatic admission to a competitive first-choice program such as the School of Business.

In effect, the University asks this Court to *assume* that minorities admitted under the Top Ten Percent Law do not demonstrate "diversity within diversity"—that they are somehow more homogenous, less dynamic, and more undesirably stereotypical than those admitted under holistic review. Thus, the University claims, absent its race-conscious holistic admissions program, it would lose the minority students necessary to achieving a qualitative critical mass. But it offers no evidence in the record to prove this, and we must therefore refuse to make this assumption.

Regrettably, the majority firmly adopts this assumption—that minority students from majority-minority Texas high schools are inherently limited in their ability to contribute to the University's vision of a diverse student body.[15] The majority reasons that race-conscious holistic review is a "necessary complement," *ante*, at 30, to the Top Ten Percent Law, which, on its own, would admit insufficient "students of unique talents and backgrounds who can enrich the diversity of the student body in distinct

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15. *See ante*, at 26 (discussing the "outcome gaps" of "segregated urban schools"); *id.* at 26 (classifying schools according to their racial and ethnic compositions). Additionally, the majority's *sua sponte* survey of Texas school districts' data on racial composition, test scores, and educational outcomes, *id.* at 26-28, ventures far beyond the summary judgment record. Under strict scrutiny, the government bears the burden of establishing compliance with the Constitution. *See Johnson*, 543 U.S. at 505. More specifically, the Supreme Court's opinion has mandated that we decide whether "*this record* . . is sufficient" to demonstrate narrow tailoring. *Fisher*, 133 S. Ct. at 2421 (emphasis added).

ways," *id.*, at 29. The majority's discussion of numerous "resegregated" Texas school districts is premised on the dangerous assumption that students from those districts (at least those in the top ten percent of each class) do not possess the qualities necessary for the University of Texas to establish a meaningful campus diversity. *See id.*, at 24-26. In this, it has embraced the very ill that the Equal Protection Clause seeks to banish. *See Croson*, 488 U.S. at 505 ("[R]acial characteristics so seldom provide a relevant basis for disparate treatment."); *Fullilove*, 448 U.S. at 523 ("[A]ny official action that treats a person differently on account of his race or ethnic origin is inherently suspect.") (Stewart, J., dissenting); *Cayetano*, 528 U.S. at 517 ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people . . . .").

Moreover, the only fact from which the majority draws this alarming conclusion is the mere reality that these districts serve majority-minority communities. *Ante*, at 24-25 ("The de facto segregation of schools in Texas enables the Top Ten Percent Law to increase minorities in the mix, while ignoring contributions to diversity beyond race.").[16] By accepting the University's standing presumption that minority students admitted under the Top Ten Percent Law do not possess the characteristics

16. The majority's reductionist assumption about the experiences of minority students admitted under the Top Ten Percent Law is startling: "The top 29 graduates from Jack Yates High School in Houston live in the same predominately African-American neighborhood of that city's Third Ward, and thus likely experienced a similar cultural environment." *Ante*, at 24 n.98.

necessary to achieve a campus environment defined by "qualitative diversity," the majority engages in the very stereotyping that the Equal Protection Clause abhors.[17]

The record does not indicate that the University evaluates students admitted under the Top Ten Percent Law, checking for indicia of qualitative diversity—diversity within diversity—before determining that race should be considered in the holistic review process to fill the remaining seats in the class. If the Top Ten Percent Law admittees were a sufficiently qualitatively diverse population, which they may well be so far as I can tell, then using race in holistic review to promote further diversity might *not* be necessary for the University to achieve its goal, and an up-front assessment of these admittees, before turning to race, could be a more narrowly-tailored option. And, in any event, the University offers no method for this court to determine when, if ever, its goal (which remains undefined) for qualitative diversity will be reached. Accordingly, the University has failed to carry its strict scrutiny burden of proving that its race-conscious admissions policy is necessary to achieving its diversity objective of a "qualitative" critical mass.

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17. This stereotyping is not limited to minority students admitted under the Top Ten Percent Law. The majority further assumes that minority students admitted under holistic review, based on their "experience of being a minority in a majority-white . . . school," likely "demonstra[te] qualities of leadership and sense of self." *Ante*, at 29. These conclusions are nonetheless stereotypes disallowed by the Fourteenth Amendment. And in any event, this record, by which we are bound, does not indicate that any minority students admitted under holistic review come from majority-white schools. *See supra* note 15.

In earlier stages of this case, the University framed its diversity goal as achieving "classroom diversity." The University suggested that classroom diversity and the distribution of minority students among colleges and majors were meaningful metrics in determining whether "critical mass" had been attained. And, indeed, the Supreme Court has recognized that increased diversity of perspectives in the classroom provides for a "livelier, more spirited, and simply more enlightening and interesting" experience. *Grutter*, 539 U.S. at 330 (quoting *Bakke*, 438 U.S. at 307). However, the University has distanced itself from this previously asserted goal, now claiming it "has never pursued classroom diversity as a discrete interest or endpoint," but merely as "one of many factors" to be considered in evaluating diversity. Given the University's failure to press the classroom diversity argument in its briefing on remand, the issue is almost certainly waived. *See United States v. Griffith*, 522 F.3d 607, 610 (5th Cir. 2008) ("It is a well-worn principle that the failure to raise an issue on appeal constitutes waiver of that argument.").

Notwithstanding this waiver, the majority addresses the issue of classroom diversity, contending that the University's race-conscious admissions policy is necessary to give "high-scoring minority students a better chance of gaining admission to UT Austin's competitive academic departments." *Ante*, at 37. Perhaps, based on the structure of the University's admissions process, it is possible that the use of race as a factor in calculating an applicant's PAI score incrementally increases the odds that a minority

applicant will be admitted to a competitive college within the University.[18] But hypothetical considerations are not enough to meet a state actor's burden under strict scrutiny. *See United States v. Virginia*, 518 U.S. 515, 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996) ("The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation."). Rather, assuming that the University's

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18. The record describes the admissions process as follows: First, the admissions staff read all applicants' files, including those of Top Ten Percent Law applicants, and assign each an AI and PAI score. Applicants with exceptionally high class rank or AI scores are automatically admitted to certain first-choice schools or majors and, thus, also to the University. Next, for applicants not automatically admitted to their first choice, the staff generate a matrix for each school with each cell on the matrix representing an intersection of AI and PAI scores. Working with liaisons from each school, the staff plot the remaining applicants' scores on matrices according to the applicants' first-choice majors. Based on the number of applicants in each matrix cell and the available seats in the class for each school, the admissions staff and liaisons draw "cut-off lines" across the matrices. Applicants not selected for admission to their first-choice school "cascade" onto the matrix for their second-choice school, where they are added to the cells along with applicants who were above the cut-off line during the previous review round. The cut-off lines are readjusted to accommodate the additional students, and those remaining above the adjusted cut-off lines are accepted to that school. Applicants not admitted to either their first- or second-choice school then "cascade" into the Liberal Arts Undecided matrix, which serves as the default third-choice major. Again, the admissions staff perform the line-drawing exercise (cognizant that remaining Top Ten Percent Law applicants must be admitted as Liberal Arts majors, thus reducing the number of available spaces), and a final determination is made for all applicants.

diversity goal is establishing classroom diversity, it is the University that bears the burden of proving that the use of race in calculating the PAI scores is necessary to furthering this goal. But instead of explaining how race enhances minority students' prospects of admission to a competitive college or major, the University admissions officers' deposition testimony specifically indicates that race could *not* be a decisive factor in any applicant's admission,[19] and that it is impossible to determine whether race was in fact decisive for any particular applicant's admission decision.[20] Absent any record evidence of the potential for race to be a decisive factor, the University cannot establish, as the majority claims, that its racial classifications could actually give any minority applicant "a better chance" of admission to a competitive college. *Ante*, at 37.

In short, the University has obscured its use of race to the point that even its own officers cannot explain the impact of race on admission to competitive colleges.[21] If

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19. When asked whether any one factor in the PAI calculation could be determinative for an applicant's admission, Dr. Bruce Walker, Vice Provost and Director of Admissions, stated "no."

20. Dr. Kedra Ishop was asked whether she could give an "example where race would have some impact on an applicant's personal achievement score?" Her answer: "In order to—it's impossible to say—to give you an example of a particular student because it's all contextual."

21. And race is entirely invisible at the moment of drawing the final admission cut-off lines, for students not automatically admitted to their first-choice program by virtue of an exceptionally

race is indeed without a discernable impact, the University cannot carry its burden of proving that race-conscious holistic review is necessary to achieving classroom diversity (or, for that matter, *any* kind of diversity). Because the role played by race in the admissions decision is essentially unknowable, I cannot find that these racial classifications are necessary or narrowly tailored to achieving the University's interest in diversity.

4

The University further claims that its race-conscious admissions program is narrowly tailored because, with the help of a rigorous periodic review system, it will "cease its consideration of race when it determines . . . that the educational benefits of diversity can be achieved at [the University] through a race-neutral policy 'at reasonable cost' to its other educational objectives." The University seeks to assure us that periodic review of its admissions policy considers enrollment data, "evidence of racial isolation and the racial climate on campus," and "other data including the educational benefits of diversity

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high class rank or AI score. The University's admissions staff and liaisons from each school admit students to the various schools and majors based solely on the combination of applicants' AI and PAI scores. While race is considered in determining PAI scores, once the scores are assigned and applicants are plotted on the matrices for the various schools, admissions officers treat applicants as points on a grid. In other words, the University officials have no way of knowing whether they are selecting applicants whose race incrementally boosted their PAI score, much less whether any particular applicant will help the University improve classroom diversity.

experienced in the classroom." In simple language, the University asserts that it knows critical mass when it sees it.

On one level, the University's review process captures the essence of the holistic diversity interest established in *Bakke*, validated in *Grutter*, and left intact by *Fisher*. *See Ante* at 12 ("Diversity is a composite of the backgrounds, experiences, achievements, and hardships of students to which race only contributes."). In fact, the *Grutter* Court discussed the important role that such reviews can play in determining whether racial classifications have continuing necessity under strict scrutiny. *Grutter*, 539 U.S. at 342.

Nonetheless, there are two distinct flaws with the University's assurances that its own, internal, periodic review is sufficient to safeguard against any unconstitutional use of race. First, strict scrutiny does not allow the judiciary to delegate wholesale to state actors the task of determining whether a race-conscious admissions policy continues to be necessary. This is the very point made by the *Fisher* Court, in vacating our previous opinion for deferring to the University's narrow-tailoring claims. *Fisher*, 133 S. Ct. at 2420-21.

Second, while the University correctly considers a range of factors in its assessment of the necessity of its use of race, *see Bakke*, 438 U.S. at 315 (describing diversity as a "broader array of qualifications and characteristics" of which race is only one), it has still not explained to us how this consideration takes place. In describing its periodic review process, the University never explains how the various factors are measured, the weight afforded to each, and what combination thereof would yield a "critical mass"

of diversity sufficient to cease use of racial classifications.

In light of this, I cannot determine that the race-conscious admissions program is narrowly tailored to the University's goal. The University, in effect, defines critical mass as a nebulous amalgam of factors—enrollment data, racial isolation, racial climate, and "the educational benefits of diversity"—that its internal periodic review is calibrated to detect. But, without more, the University fails to prove narrow tailoring with clarity. *Fisher*, 133 S. Ct. at 2418. Such a bare submission, in essence, begs for the deference that is irreconcilable with "meaningful" judicial review. *Id.* at 2421.

5

Lastly, the University submits that its race-conscious admissions policy necessarily satisfies narrow tailoring because it is closely modeled on the admissions program upheld by the Supreme Court in *Grutter*. Similarly, the majority implies that the race-conscious admissions policy's similarity to *Grutter* is, itself, a meaningful factor in our strict scrutiny analysis.[22] This claim is unpersuasive.

Fisher confirms that we are obligated to consider the particular challenged race-conscious program on its own terms and ask whether the University "could achieve sufficient diversity without using racial classifications." 133 S. Ct. at 2420. Strict scrutiny is not a hypothetical

22. *See ante*, at 16 (describing the University's use of race with direct reference to the program approved in *Grutter*); *id.* at 29 ("UT Austin's holistic review program—a program nearly indistinguishable from the University of Michigan Law School's program in *Grutter* . . .").

undertaking, but rather "imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice." *Id.*

Certain aspects of the University's admissions policy do parallel the features of the plan upheld in *Grutter*—race is only a sub-factor within a holistic, individualized review process, and the University's goal is framed in terms of "critical mass." But the University, under mandate by the Texas Legislature's Top Ten Percent Law, admits the majority of its entering class through a separate, race-neutral scheme.[23] This inevitably impacts the narrow tailoring calculus presently under consideration. That is, while the University's race-conscious admissions policy is conceptually derived from the University of Michigan Law School's approach, the two are quite distinct in practice: The University's holistic review coexists with a separate process that admits a large population of students, a circumstance not contemplated in *Grutter*.[24]

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23. The majority implies that the University's implementation of the Top Ten Percent Law was discretionary. *See ante*, at 15 ("UT Austin *turned* to the Top Ten Percent Plan . . . ." (emphasis added)); *id.* at 16 ("We are offered no coherent response to the validity of a potentially *different election* by UT Austin: to invert the process and use *Grutter's* holistic review to select 80% or all of its students." (emphasis added)). There was no such choice; the University was mandated by the law to admit any graduate in the top ten percent of his or her high school class. And, as explained below, the Top Ten Percent Law is not challenged in this appeal.

24. Additionally, I observe that the admissions program here and that in *Grutter* do not seem to use race in the same way.

Similarity to *Grutter* is not a narrow-tailoring talisman that insulates the University's policy from strict scrutiny. The University's burden is to prove that *its own* use of racial classifications is necessary and narrowly tailored for achieving *its own* diversity objectives.

B

Ultimately, the record is devoid of any specifically articulated connection between the University's diversity goal of "critical mass" and its race-conscious admissions process. The University has not shown how it determines the existence, or lack, of a "critical mass" of diversity in its student population. Rather, the University only frames its goal as "obtaining the educational benefits of diversity." This is entirely circular reasoning that cannot satisfy the rigorous means-to-ends analysis required under strict scrutiny. *Fisher*, 133 S. Ct. at 2421.

To be clear, my concern is not with the University's use of the term "critical mass" itself. Even if the University were to adopt another rhetorical construct to explain its diversity objectives, it faces the same underlying problem—it does not offer a clear and definite articulation of its goal sufficient for a reviewing court to verify narrow

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Even accepting that the University uses race as a "factor of a factor of a factor," here, the University incorporates race into the PAI before individual admissions decisions are made on the matrices, at which point race is invisible. *See supra* note 21. By contrast, in *Grutter*, each law school applicant's file, including his or her racial classification, was considered during a holistic, full-file review. *See* 539 U.S. at 334-36.

tailoring. The University's failure to meet its strict scrutiny burden is a function of its undefined ends, not its choice to label those ends as "critical mass."

IV

The majority concludes that the University's race-conscious admissions program is narrowly tailored because the University has exhausted all workable alternatives. *Ante*, at 41. Much of today's opinion explores the historical "narrative" of the University's admissions process, including many race-neutral recruitment programs intended to bolster minority enrollment. *Id.* at 15. And, indeed, the University's many efforts to achieve a diverse campus learning environment without resorting to racial classifications are commendable. But, framing this history as something akin to a process of elimination, the majority finds that the University's race-conscious admissions program must be necessary and narrowly tailored to the University's diversity objectives. This is insufficient to satisfy strict scrutiny.

Certainly, the University's past experiences with race-neutral initiatives are relevant to the inquiry because the University must establish that "no workable race-neutral alternatives would produce the educational benefits of diversity," and because the University's "experience and expertise" provide some context to inform judicial review. *Fisher*, 133 S. Ct. at 2420. However, we cannot conclude that the University's current race-conscious admissions program—the only matter before this court—is narrowly tailored to achieve the educational benefits of diversity

because the University has failed to define what it means by "critical mass." In other words, the University's long history of purportedly unsuccessful alternatives is meaningless if we cannot discern the contours of the success it now seeks.

Additionally, the majority's sustained focus on the Top Ten Percent Law is misplaced. While the Law is indeed central to this case, here, as in our previous consideration of this appeal, "[n]o party challenged, in the district court or in this court, the validity or the wisdom of the Top Ten Percent Law." *Fisher*, 631 F.3d at 247 (King, J., specially concurring). Nevertheless, the majority forcefully indicts the Law for frustrating the University's efforts to achieve well-rounded diversity. In the majority's view, the Law's shortcomings make a holistic review program more necessary. *Ante*, at 30 ("We are persuaded that holistic review is a necessary complement to the Top Ten Percent Plan, enabling it to operate without reducing itself to a cover for a quota system . . . ."). At most, the Law's mechanical operation—admitting students based on the sole metric of high school class rank—might suggest that *some form* of holistic review is advisable to supplement the admissions process. But this issue is not before us at all. Our task is to determine whether the University's injection of *race* into its admissions process survives strict scrutiny.

The Top Ten Percent Law matters only insofar as it causes the University to admit a large number of minority students separate and apart from the holistic review process. That is, the Law creates a separate admissions channel for many minority students, which then calls into

question the necessity of using race as a factor in the holistic review process for filling the remaining seats. Whether, in light of the Top Ten Percent Law, race-conscious holistic review is more or less necessary is an open question, and it is *the University* that bears the burden of explaining how the Law impacts its achievement of its diversity goal. Here, it has failed to do so, under any theory of "critical mass" it has proffered.[25]

* * *

The material facts of this case have remained unchanged since the district court's grant of summary judgment, but the governing law has changed markedly. *Fisher* established that strict scrutiny in the higher education affirmative action setting is no different than strict scrutiny in other equal protection contexts—the

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25. There are additional elements of the majority's discussion of the Top Ten Percent Law that I cannot join. First, to bolster the "necessity" of race-conscious holistic review, the majority explains that holistic-review admittees have higher standardized test scores. *Ante*, at 24 & nn. 96-97. However, no testimony or record evidence establishes whether the gap in SAT scores between Top Ten Percent and Non-Top Ten Percent admittees is statistically significant. And as the University's president explained in 2000, "top 10 percent high school students make much higher grades in college than non-top 10 percent students," and "[s]trong academic performance in high school is an even better predictor of success in college than standardized test scores." At best, the academic superiority of holistic review admittees as a group is highly contested. Second, legislative changes to the Top Ten Percent Law after 2008, the relevant year for our purposes, are not germane to our analysis. *See ante*, at 32 (discussing S.B. 175).

state actor receives no deference in proving that its chosen race-conscious means are narrowly tailored to its ends. The majority fails to give *Fisher* its proper weight. Today's opinion sidesteps the new strict scrutiny standard and continues to defer to the University's claims that its use of racial classifications is narrowly tailored to its diversity goal. Because the University has not defined its diversity goal in any meaningful way—instead, reflexively reciting the term "critical mass"—it is altogether impossible to determine whether its use of racial classifications is narrowly tailored.

This is not to say, however, that it is impossible for a public university to define its diversity ends adequately for a court to verify narrow tailoring with the requisite exacting scrutiny. After all, "[s]trict scrutiny must not be strict in theory but fatal in fact." *Fisher*, 133 S. Ct. at 2421 (internal quotations omitted). It may even be possible for a university to do so while seeking a "critical mass." What matters now, after *Fisher*, is that a state actor's diversity goals must be sufficiently clear and definite such that a reviewing court can assess, without deference, whether its particular use of racial classifications is necessary and narrowly tailored to those goals. On this record, the University has not "offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity." *Fisher*, 133 S. Ct. at 2421. Accordingly, I would reverse and render judgment for Fisher.

I respectfully dissent.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, DATED JULY 15, 2014

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-50822

D.C. Docket No. 1:08-CV-263

ABIGAIL NOEL FISHER,

Plaintiff-Appellant

v.

UNIVERSITY OF TEXAS AT AUSTIN; DAVID B. PRYOR, Executive Vice Chancellor for Academic Affairs in His Official Capacity; WILLIAM POWERS, JR., President of the University of Texas at Austin in His Official Capacity; BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM; R. STEVEN HICKS, as Member of the Board of Regents in His Official Capacity; WILLIAM EUGENE POWELL, as Member of the Board of Regents in His Official Capacity; JAMES R. HUFFINES, as Member of the Board of Regents in His Official Capacity; JANIECE LONGORIA, as Member of the Board of Regents in Her Official Capacity; COLLEEN MCHUGH, as Member of the Board of Regents in Her Official Capacity; ROBERT L. STILLWELL, as Member of the Board of Regents in His Official Capacity; JAMES D.

Appendix B

DANNENBAUM, as Member of the Board of Regents in His Official Capacity; PAUL FOSTER, as Member of the Board of Regents in His Official Capacity; PRINTICE L. GARY, as Member of the Board of Regents in His Official Capacity; KEDRA ISHOP, Vice Provost and Director of Undergraduate Admissions in Her Official Capacity; FRANCISCO G. CIGARROA, M.D., Interim Chancellor of the University of Texas System in His Official Capacity,

Defendants-Appellees

Appeal from the United States District Court for the Western District of Texas, Austin

Before KING, HIGGINBOTHAM, and GARZA, Circuit Judges.

JUDGMENT ON REMAND FROM THE UNITED STATES SUPREME COURT

This cause came on to be heard on remand from the Supreme Court of the United States.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

EMILIO M. GARZA, Circuit Judge, dissenting:

Appendix B

ISSUED AS MANDATE:

A True Copy
Attest

Clerk, U.S. Court of Appeals,
Fifth Circuit

By: _____
Deputy

New Orleans, Louisiana

APPENDIX C — ORDER DENYING PETITION FOR REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, DATED NOVEMBER 12, 2014

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-50822

ABIGAIL NOEL FISHER,

Plaintiff - Appellant

v.

UNIVERSITY OF TEXAS AT AUSTIN; DAVID B. PRYOR, Executive Vice Chancellor for Academic Affairs in His Official Capacity; WILLIAM POWERS, JR., President of the University of Texas at Austin in His Official Capacity; BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM; R. STEVEN HICKS, as Member of the Board of Regents in His Official Capacity; WILLIAM EUGENE POWELL, as Member of the Board of Regents in His Official Capacity; JAMES R. HUFFINES, as Member of the Board of Regents in His Official Capacity; JANIECE LONGORIA, as Member of the Board of Regents in Her Official Capacity; COLLEEN MCHUGH, as Member of the Board of Regents in Her Official Capacity; ROBERT L. STILLWELL, as Member of the Board of Regents in His Official Capacity; JAMES D. DANNENBAUM, as Member of the Board of Regents in His Official Capacity; PAUL FOSTER, as Member of the Board of Regents in His Official Capacity; PRINTICE L. GARY, as Member of the Board of Regents in His Official Capacity; KEDRA ISHOP, Vice

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Provost and Director of Undergraduate Admissions in Her Official Capacity; FRANCISCO G. CIGARROA, M.D., Interim Chancellor of the University of Texas System in His Official Capacity,

Defendants-Appellees

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING EN BANC
(Opinion July 15, 2014, 758 F.3d 633)

Before KING, HIGGINBOTHAM, and GARZA, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. 35 and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED. Judge Garza, joined by Judges Jones, Smith, Clement, and Owen, dissents from the court's denial of rehearing en banc, and his dissent is attached.

In the en banc poll, 5 judges voted in favor of rehearing (Judges Jones, Smith, Clement, Owen, and Elrod) and 10 judges voted against rehearing (Chief Judge Stewart and Judges Jolly, Davis, Dennis, Prado, Southwick, Haynes, Graves, Higginson, and Costa).

Appendix C

ENTERED FOR THE COURT:

/s/_____
UNITED STATES CIRCUIT JUDGE

Appendix C

EMILIO M. GARZA, Circuit Judge, dissenting from Denial of Rehearing En Banc, joined by JONES, SMITH, CLEMENT, and OWEN, Circuit Judges:

The en banc court, by denying en banc review, effectively adopts the panel majority's opinion rejecting the dictates of *Fisher v. University of Texas at Austin* which requires that this court not defer to the University's claim that its use of racial classifications in its admissions process is narrowly tailored to its stated goal. 133 S. Ct. 2411, 2420 (2013). Clearly the panel majority dutifully bows to *Fisher*'s requirements, but then fails to conduct the strict scrutiny analysis it requires, thus returning to the deferential models of *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), and *Grutter v. Bollinger*, 539 U.S. 306 (2003).

In my dissent, I explain and analyze with some detail the University's position, in which it fails to furnish any articulated meaning for its stated goal of "critical mass." *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 666–75 (5th Cir. 2014) (Garza, J., dissenting). By not providing a clear definition of that end goal, the University eliminates any chance that this court could conduct the "most rigid scrutiny" of its race-conscious admissions program. See *Fisher*, 133 S. Ct. at 2419 (quoting *Loving v. Virginia*, 388 U.S. 1, 11 (1967)). Analytically, *Fisher* requires that the University's stated goal not be confined to the assessment of the University's decision to pursue diversity, but also reach the narrow tailoring analysis. "The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal." *Id.* at 2420.

For these reasons, more comprehensively stated in my panel dissent, I respectfully dissent from the denial of rehearing en banc.

APPENDIX D— OPINION OF THE SUPREME COURT OF THE UNITED STATES, DATED JUNE 24, 2013

SUPREME COURT OF THE UNITED STATES

No. 11-345

ABIGAIL NOEL FISHER,

Petitioner

v.

UNIVERSITY OF TEXAS AT AUSTIN *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

October 10, 2012, Argued
June 24, 2013, Decided

JUSTICE KENNEDY delivered the opinion of the Court.

The University of Texas at Austin considers race as one of various factors in its undergraduate admissions process. Race is not itself assigned a numerical value for each applicant, but the University has committed itself to increasing racial minority enrollment on campus. It refers to this goal as a "critical mass." Petitioner, who is Caucasian, sued the University after her application was rejected. She contends that the University's use of race in the admissions process violated the Equal Protection Clause of the Fourteenth Amendment.

Appendix D

The parties asked the Court to review whether the judgment below was consistent with "this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Grutter* v. *Bollinger*, 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003)." Pet. for Cert. i. The Court concludes that the Court of Appeals did not hold the University to the demanding burden of strict scrutiny articulated in *Grutter* and *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 305, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978) (opinion of Powell, J.). Because the Court of Appeals did not apply the correct standard of strict scrutiny, its decision affirming the District Court's grant of summary judgment to the University was incorrect. That decision is vacated, and the case is remanded for further proceedings.

I

A

Located in Austin, Texas, on the most renowned campus of the Texas state university system, the University is one of the leading institutions of higher education in the Nation. Admission is prized and competitive. In 2008, when petitioner sought admission to the University's entering class, she was 1 of 29,501 applicants. From this group 12,843 were admitted, and 6,715 accepted and enrolled. Petitioner was denied admission.

In recent years the University has used three different programs to evaluate candidates for admission. The first is the program it used for some years before 1997, when the University considered two factors: a numerical

score reflecting an applicant's test scores and academic performance in high school (Academic Index or AI), and the applicant's race. In 1996, this system was held unconstitutional by the United States Court of Appeals for the Fifth Circuit. It ruled the University's consideration of race violated the Equal Protection Clause because it did not further any compelling government interest. *Hopwood* v. *Texas*, 78 F.3d 932, 955 (1996).

The second program was adopted to comply with the *Hopwood* decision. The University stopped considering race in admissions and substituted instead a new holistic metric of a candidate's potential contribution to the University, to be used in conjunction with the Academic Index. This "Personal Achievement Index" (PAI) measures a student's leadership and work experience, awards, extracurricular activities, community service, and other special circumstances that give insight into a student's background. These included growing up in a single-parent home, speaking a language other than English at home, significant family responsibilities assumed by the applicant, and the general socioeconomic condition of the student's family. Seeking to address the decline in minority enrollment after *Hopwood*, the University also expanded its outreach programs.

The Texas State Legislature also responded to the *Hopwood* decision. It enacted a measure known as the Top Ten Percent Law, codified at Tex. Educ. Code Ann. § 51.803 (West 2009). Also referred to as H. B. 588, the Top Ten Percent Law grants automatic admission to any public state college, including the University, to all students in

the top 10% of their class at high schools in Texas that comply with certain standards.

The University's revised admissions process, coupled with the operation of the Top Ten Percent Law, resulted in a more racially diverse environment at the University. Before the admissions program at issue in this case, in the last year under the post-*Hopwood* AI/PAI system that did not consider race, the entering class was 4.5% African-American and 16.9% Hispanic. This is in contrast with the 1996 pre-*Hopwood* and Top Ten Percent regime, when race was explicitly considered, and the University's entering freshman class was 4.1% African-American and 14.5% Hispanic.

Following this Court's decisions in *Grutter* v. *Bollinger*, *supra*, and *Gratz* v. *Bollinger*, 539 U.S. 244, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003), the University adopted a third admissions program, the 2004 program in which the University reverted to explicit consideration of race. This is the program here at issue. In *Grutter*, the Court upheld the use of race as one of many "plus factors" in an admissions program that considered the overall individual contribution of each candidate. In *Gratz*, by contrast, the Court held unconstitutional Michigan's undergraduate admissions program, which automatically awarded points to applicants from certain racial minorities.

The University's plan to resume race-conscious admissions was given formal expression in June 2004 in an internal document entitled Proposal to Consider Race and Ethnicity in Admissions (Proposal). Supp. App. 1a.

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The Proposal relied in substantial part on a study of a subset of undergraduate classes containing between 5 and 24 students. It showed that few of these classes had significant enrollment by members of racial minorities. In addition the Proposal relied on what it called "anecdotal" reports from students regarding their "interaction in the classroom." The Proposal concluded that the University lacked a "critical mass" of minority students and that to remedy the deficiency it was necessary to give explicit consideration to race in the undergraduate admissions program.

To implement the Proposal the University included a student's race as a component of the PAI score, beginning with applicants in the fall of 2004. The University asks students to classify themselves from among five predefined racial categories on the application. Race is not assigned an explicit numerical value, but it is undisputed that race is a meaningful factor.

Once applications have been scored, they are plotted on a grid with the Academic Index on the x-axis and the Personal Achievement Index on the y-axis. On that grid students are assigned to so-called cells based on their individual scores. All students in the cells falling above a certain line are admitted. All students below the line are not. Each college—such as Liberal Arts or Engineering—admits students separately. So a student is considered initially for her first-choice college, then for her second choice, and finally for general admission as an undeclared major.

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Petitioner applied for admission to the University's 2008 entering class and was rejected. She sued the University and various University officials in the United States District Court for the Western District of Texas. She alleged that the University's consideration of race in admissions violated the Equal Protection Clause. The parties cross-moved for summary judgment. The District Court granted summary judgment to the University. The United States Court of Appeals for the Fifth Circuit affirmed. It held that *Grutter* required courts to give substantial deference to the University, both in the definition of the compelling interest in diversity's benefits and in deciding whether its specific plan was narrowly tailored to achieve its stated goal. Applying that standard, the court upheld the University's admissions plan. 631 F.3d 213, 217-218 (2011).

Over the dissent of seven judges, the Court of Appeals denied petitioner's request for rehearing en banc. See 644 F.3d 301, 303 (CA5 2011) (*per curiam*). Petitioner sought a writ of certiorari. The writ was granted. 565 U.S. ___, 132 S. Ct. 1536, 182 L. Ed. 2d 160 (2012).

B

Among the Court's cases involving racial classifications in education, there are three decisions that directly address the question of considering racial minority status as a positive or favorable factor in a university's admissions process, with the goal of achieving the educational benefits of a more diverse student body: *Bakke*, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed. 2d 750; *Gratz*, *supra*; and *Grutter*,

539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304. We take those cases as given for purposes of deciding this case.

We begin with the principal opinion authored by Justice Powell in *Bakke, supra.* In *Bakke,* the Court considered a system used by the medical school of the University of California at Davis. From an entering class of 100 students the school had set aside 16 seats for minority applicants. In holding this program impermissible under the Equal Protection Clause Justice Powell's opinion stated certain basic premises. First, "decisions based on race or ethnic origin by faculties and administrations of state universities are reviewable under the Fourteenth Amendment." *Id.*, at 287, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (separate opinion). The principle of equal protection admits no "artificial line of a 'twoclass theory'" that "permits the recognition of special wards entitled to a degree of protection greater than that accorded others." *Id.*, at 295, 98 S. Ct. 2733, 57 L. Ed. 2d 750. It is therefore irrelevant that a system of racial preferences in admissions may seem benign. Any racial classification must meet strict scrutiny, for when government decisions "touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Id.*, at 299, 98 S. Ct. 2733, 57 L. Ed. 2d 750.

Next, Justice Powell identified one compelling interest that could justify the consideration of race: the interest in the educational benefits that flow from a diverse student body. Redressing past discrimination could not serve as a

compelling interest, because a university's "broad mission [of] education" is incompatible with making the "judicial, legislative, or administrative findings of constitutional or statutory violations" necessary to justify remedial racial classification. *Id.*, at 307-309, 98 S. Ct. 2733, 57 L. Ed. 2d 750.

The attainment of a diverse student body, by contrast, serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes. The academic mission of a university is "a special concern of the First Amendment." *Id.*, at 312, 98 S. Ct. 2733, 57 L. Ed. 2d 750. Part of "'the business of a university [is] to provide that atmosphere which is most conducive to speculation, experiment, and creation,'" and this in turn leads to the question of "'who may be admitted to study.'" *Sweezy* v. *New Hampshire*, 354 U.S. 234, 263, 77 S. Ct. 1203, 1 L. Ed. 2d 1311 (1957) (Frankfurter, J., concurring in judgment).

Justice Powell's central point, however, was that this interest in securing diversity's benefits, although a permissible objective, is complex. "It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Bakke*, 438 U.S., at 315, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (separate opinion).

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In *Gratz*, 539 U.S. 244, 123 S. Ct. 2411, 156 L. Ed. 2d 257, and *Grutter*, *supra*, the Court endorsed the precepts stated by Justice Powell. In *Grutter*, the Court reaffirmed his conclusion that obtaining the educational benefits of "student body diversity is a compelling state interest that can justify the use of race in university admissions." *Id.*, at 325, 123 S. Ct. 2325, 156 L. Ed. 2d 304.

As *Gratz* and *Grutter* observed, however, this follows only if a clear precondition is met: The particular admissions process used for this objective is subject to judicial review. Race may not be considered unless the admissions process can withstand strict scrutiny. "Nothing in Justice Powell's opinion in *Bakke* signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by our strict scrutiny analysis." *Gratz*, *supra*, at 275, 123 S. Ct. 2411, 156 L. Ed. 2d 257. "To be narrowly tailored, a race-conscious admissions program cannot use a quota system," *Grutter*, 539 U.S., at 334, 123 S. Ct. 2325, 156 L. Ed. 2d 304, but instead must "remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application," *id.*, at 337, 123 S. Ct. 2325, 156 L. Ed. 2d 304. Strict scrutiny requires the university to demonstrate with clarity that its "purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose." *Bakke*, 438 U.S., at 305, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (opinion of Powell, J.) (internal quotation marks omitted).

While these are the cases that most specifically address the central issue in this case, additional guidance may be found in the Court's broader equal protection jurisprudence which applies in this context. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people," *Rice* v. *Cayetano*, 528 U.S. 495, 517, 120 S. Ct. 1044, 145 L. Ed. 2d 1007 (2000) (internal quotation marks omitted), and therefore "are contrary to our traditions and hence constitutionally suspect," *Bolling* v. *Sharpe*, 347 U.S. 497, 499, 74 S. Ct. 693, 98 L. Ed. 884 (1954). "'[B]ecause racial characteristics so seldom provide a relevant basis for disparate treatment,'" *Richmond* v. *J. A. Croson Co.*, 488 U.S. 469, 505, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989) (quoting *Fullilove* v. *Klutznick*, 448 U.S. 448, 533-534, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980) (Stevens, J., dissenting)), "the Equal Protection Clause demands that racial classifications . . . be subjected to the 'most rigid scrutiny.'" *Loving* v. *Virginia*, 388 U.S. 1, 11, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967).

To implement these canons, judicial review must begin from the position that "any official action that treats a person differently on account of his race or ethnic origin is inherently suspect." *Fullilove*, *supra*, at 523, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (Stewart, J., dissenting); *McLaughlin* v. *Florida*, 379 U.S. 184, 192, 85 S. Ct. 283, 13 L. Ed. 2d 222 (1964). Strict scrutiny is a searching examination, and it is the government that bears the burden to prove "'that the reasons for any [racial] classification [are] clearly identified and unquestionably legitimate,'" *Croson*, *supra*, at 505, 109 S. Ct. 706, 102 L.

Ed. 2d 854 (quoting *Fullilove*, *supra*, at 533-535, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (Stevens, J., dissenting)).

II

Grutter made clear that racial "classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." 539 U.S., at 326, 123 S. Ct. 2325, 156 L. Ed. 2d 304. And *Grutter* endorsed Justice Powell's conclusion in *Bakke* that "the attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education." 438 U.S., at 311-312, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (separate opinion). Thus, under *Grutter*, strict scrutiny must be applied to any admissions program using racial categories or classifications.

According to *Grutter*, a university's "educational judgment that such diversity is essential to its educational mission is one to which we defer." 539 U.S. at 328, 123 S. Ct. 2325, 156 L. Ed. 2d 304. *Grutter* concluded that the decision to pursue "the educational benefits that flow from student body diversity," *id.*, at 330, 123 S. Ct. 2325, 156 L. Ed. 2d 304, that the University deems integral to its mission is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper under *Grutter*. A court, of course, should ensure that there is a reasoned, principled explanation for the academic decision. On this point, the District Court and Court of Appeals were correct in finding that *Grutter* calls for deference to the University's conclusion, "'based on its experience and expertise,'" 631 F.3d, at 230 (quoting

645 F. Supp. 2d 587, 603 (WD Tex. 2009)), that a diverse student body would serve its educational goals. There is disagreement about whether *Grutter* was consistent with the principles of equal protection in approving this compelling interest in diversity. See *post*, at ___, 186 L. Ed. 2d, at 489 (Scalia, J., concurring); *post*, at ___-___, 186 L. Ed. 2d, at 491 (Thomas, J., concurring); *post*, at ___-___, 186 L. Ed. 2d, at 500-501 (Ginsburg, J., dissenting). But the parties here do not ask the Court to revisit that aspect of *Grutter*'s holding.

A university is not permitted to define diversity as "some specified percentage of a particular group merely because of its race or ethnic origin." *Bakke*, *supra*, at 307, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (opinion of Powell, J.). "That would amount to outright racial balancing, which is patently unconstitutional." *Grutter*, *supra*, at 330, 123 S. Ct. 2325, 156 L. Ed. 2d 304. "Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'" *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U.S. 701, 732, 127 S. Ct. 2738, 168 L. Ed. 2d 508 (2007).

Once the University has established that its goal of diversity is consistent with strict scrutiny, however, there must still be a further judicial determination that the admissions process meets strict scrutiny in its implementation. The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference. *Grutter* made clear that it is for the courts,

not for university administrators, to ensure that "[t]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose." 539 U.S., at 333, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (internal quotation marks omitted). True, a court can take account of a university's experience and expertise in adopting or rejecting certain admissions processes. But, as the Court said in *Grutter*, it remains at all times the University's obligation to demonstrate, and the Judiciary's obligation to determine, that admissions processes "ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application." *Id.*, at 337, 123 S. Ct. 2325, 156 L. Ed. 2d 304.

Narrow tailoring also requires that the reviewing court verify that it is "necessary" for a university to use race to achieve the educational benefits of diversity. *Bakke*, *supra*, at 305, 98 S. Ct. 2733, 57 L. Ed. 2d 750. This involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications. Although "[n]arrow tailoring does not require exhaustion of every *conceivable* race-neutral alternative," strict scrutiny does require a court to examine with care, and not defer to, a university's "serious, good faith consideration of workable race-neutral alternatives." See *Grutter*, 539 U.S., at 339-340, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (emphasis added). Consideration by the university is of course necessary, but it is not sufficient to satisfy strict scrutiny: The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of

diversity. If "'a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense,'" *Wygant* v. *Jackson Bd. of Ed.*, 476 U.S. 267, 280, n. 6, 106 S. Ct. 1842, 90 L. Ed. 2d 260 (1986) (quoting Greenawalt, Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions, 75 Colum. L. Rev. 559, 578-579 (1975)), then the university may not consider race. A plaintiff, of course, bears the burden of placing the validity of a university's adoption of an affirmative action plan in issue. But strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.

Rather than perform this searching examination, however, the Court of Appeals held petitioner could challenge only "whether [the University's] decision to reintroduce race as a factor in admissions was made in good faith." 631 F.3d, at 236. And in considering such a challenge, the court would "presume the University acted in good faith" and place on petitioner the burden of rebutting that presumption. *Id.*, at 231-232. The Court of Appeals held that to "second-guess the merits" of this aspect of the University's decision was a task it was "ill-equipped to perform" and that it would attempt only to "ensure that [the University's] decision to adopt a race-conscious admissions policy followed from [a process of] good faith consideration." *Id.*, at 231. The Court of Appeals thus concluded that "the narrow-tailoring inquiry—like the compelling-interest inquiry—is undertaken with a degree of deference to the Universit[y]." *Id.*, at 232. Because "the efforts of the University have been studied,

serious, and of high purpose," the Court of Appeals held that the use of race in the admissions program fell within "a constitutionally protected zone of discretion." *Id.*, at 231.

These expressions of the controlling standard are at odds with *Grutter*'s command that "all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'" 539 U.S., at 326, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (quoting *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 227, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995)). In *Grutter*, the Court approved the plan at issue upon concluding that it was not a quota, was sufficiently flexible, was limited in time, and followed "serious, good faith consideration of workable race-neutral alternatives." 539 U.S., at 339, 123 S. Ct. 2325, 156 L. Ed. 2d 304. As noted above, see *supra*, at ___, 186 L. Ed. 2d, at 481, the parties do not challenge, and the Court therefore does not consider, the correctness of that determination.

Grutter did not hold that good faith would forgive an impermissible consideration of race. It must be remembered that "the mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight." *Croson*, 488 U.S., at 500, 109 S. Ct. 706, 102 L. Ed. 2d 854. Strict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice.

The higher education dynamic does not change the narrow tailoring analysis of strict scrutiny applicable in

other contexts. "[T]he analysis and level of scrutiny applied to determine the validity of [a racial] classification do not vary simply because the objective appears acceptable . . . . While the validity and importance of the objective may affect the outcome of the analysis, the analysis itself does not change." *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724, n. 9, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982).

The District Court and Court of Appeals confined the strict scrutiny inquiry in too narrow a way by deferring to the University's good faith in its use of racial classifications and affirming the grant of summary judgment on that basis. The Court vacates that judgment, but fairness to the litigants and the courts that heard the case requires that it be remanded so that the admissions process can be considered and judged under a correct analysis. See *Adarand*, *supra*, at 237, 115 S. Ct. 2097, 132 L. Ed. 2d 158. Unlike *Grutter*, which was decided after trial, this case arises from cross-motions for summary judgment. In this case, as in similar cases, in determining whether summary judgment in favor of the University would be appropriate, the Court of Appeals must assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity. Whether this record—and not "simple . . . assurances of good intention," *Croson*, *supra*, at 500, 109 S. Ct. 706, 102 L. Ed. 2d 854 —is sufficient is a question for the Court of Appeals in the first instance.

Appendix D

* * *

Strict scrutiny must not be "'strict in theory, but fatal in fact,'" *Adarand*, *supra*, at 237, 115 S. Ct. 2097, 132 L. Ed. 2d 158; see also *Grutter*, *supra*, at 326, 123 S. Ct. 2325, 156 L. Ed. 2d 304. But the opposite is also true. Strict scrutiny must not be strict in theory but feeble in fact. In order for judicial review to be meaningful, a university must make a showing that its plan is narrowly tailored to achieve the only interest that this Court has approved in this context: the benefits of a student body diversity that "encompasses a . . . broa[d] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Bakke*, 438 U.S., at 315, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (opinion of Powell, J.). The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE KAGAN took no part in the consideration or decision of this case.

Appendix D

SUPREME COURT OF THE UNITED STATES

No. 11-345

ABIGAIL NOEL FISHER,

Petitioner

v.

UNIVERSITY OF TEXAS AT AUSTIN *et al.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October 10, 2012, Argued
June 24, 2013, Decided

JUSTICE SCALIA, concurring.

I adhere to the view I expressed in *Grutter* v. *Bollinger*: "The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception." 539 U.S. 306, 349, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003) (opinion concurring in part and dissenting in part). The petitioner in this case did not ask us to overrule *Grutter*'s holding that a "compelling interest" in the educational benefits of diversity can justify racial preferences in university admissions. Tr. of Oral Arg. 8-9. I therefore join the Court's opinion in full.

Appendix D

SUPREME COURT OF THE UNITED STATES

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UNIVERSITY OF TEXAS AT AUSTIN *et al.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October 10, 2012, Argued
June 24, 2013, Decided

JUSTICE THOMAS, concurring.

I join the Court's opinion because I agree that the Court of Appeals did not apply strict scrutiny to the University of Texas at Austin's (University) use of racial discrimination in admissions decisions. *Ante*, at ___, 186 L. Ed. 2d, at 481. I write separately to explain that I would overrule *Grutter* v. *Bollinger*, 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003), and hold that a State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause.

Appendix D

I

A

The Fourteenth Amendment provides that no State shall "deny to any person . . . the equal protection of the laws." The Equal Protection Clause guarantees every person the right to be treated equally by the State, without regard to race. "At the heart of this [guarantee] lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups." *Missouri* v. *Jenkins*, 515 U.S. 70, 120-121, 115 S. Ct. 2038, 132 L. Ed. 2d 63 (1995) (Thomas, J., concurring). "It is for this reason that we must subject all racial classifications to the strictest of scrutiny." *Id.*, at 121, 115 S. Ct. 2038, 132 L. Ed. 2d 63.

Under strict scrutiny, all racial classifications are categorically prohibited unless they are "'necessary to further a compelling governmental interest'" and "narrowly tailored to that end." *Johnson* v. *California*, 543 U.S. 499, 514, 125 S. Ct. 1141, 160 L. Ed. 2d 949 (2005) (quoting *Grutter*, *supra*, at 327, 123 S. Ct. 2325, 156 L. Ed. 2d 304). This most exacting standard "has proven automatically fatal" in almost every case. *Jenkins*, *supra*, at 121, 115 S. Ct. 2038, 132 L. Ed. 2d 63 (Thomas, J., concurring). And rightly so. "Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that [racial] classifications ultimately have a destructive impact on the individual and our society." *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 240, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995) (Thomas, J., concurring in part and concurring

in judgment). "The Constitution abhors classifications based on race" because "every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." *Grutter, supra*, at 353, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (Thomas, J., concurring in part and dissenting in part).

B

1

The Court first articulated the strict-scrutiny standard in *Korematsu* v. *United States*, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944). There, we held that "[p]ressing public necessity may sometimes justify the existence of [racial discrimination]; racial antagonism never can." *Id.*, at 216, 65 S. Ct. 193, 89 L. Ed. 194.[1] Aside from *Grutter*, the Court has recognized only two instances in which a "[p]ressing public necessity" may justify racial discrimination by the government. First, in *Korematsu*, the Court recognized that protecting national security may satisfy this exacting standard. In that case, the Court upheld an evacuation order directed at "all persons of Japanese ancestry" on the grounds that the Nation was at war with Japan and that the order had "a definite and close relationship to the prevention of espionage and sabotage." 323 U.S. at 217-218, 65 S. Ct. 193, 89 L. Ed. 194. Second, the Court has recognized that the government has a compelling interest in remedying past discrimination for which it is responsible, but we have stressed that a

1. The standard of "pressing public necessity" is more frequently called a "compelling governmental interest." I use the terms interchangeably.

government wishing to use race must provide "a 'strong basis in evidence for its conclusion that remedial action [is] necessary.'" *Richmond* v. *J. A. Croson Co.*, 488 U.S. 469, 500, 504, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989) (quoting *Wygant* v. *Jackson Bd. of Ed.*, 476 U.S. 267, 277, 106 S. Ct. 1842, 90 L. Ed. 2d 260 (1986) (plurality opinion)).

In contrast to these compelling interests that may, in a narrow set of circumstances, justify racial discrimination, the Court has frequently found other asserted interests insufficient. For example, in *Palmore* v. *Sidoti*, 466 U.S. 429, 104 S. Ct. 1879, 80 L. Ed. 2d 421 (1984), the Court flatly rejected a claim that the best interests of a child justified the government's racial discrimination. In that case, a state court awarded custody to a child's father because the mother was in a mixed-race marriage. The state court believed the child might be stigmatized by living in a mixed-race household and sought to avoid this perceived problem in its custody determination. We acknowledged the possibility of stigma but nevertheless concluded that "the reality of private biases and the possible injury they might inflict" do not justify racial discrimination. *Id.*, at 433, 104 S. Ct. 1879, 80 L. Ed. 2d 421. As we explained, "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Ibid.*

Two years later, in *Wygant*, *supra*, the Court held that even asserted interests in remedying societal discrimination and in providing role models for minority students could not justify governmentally imposed racial

discrimination. In that case, a collective-bargaining agreement between a school board and a teacher's union favored teachers who were "'Black, American Indian, Oriental, or of Spanish descendancy.'" *Id.*, at 270-271, 106 S. Ct. 1842, 90 L. Ed. 2d 260, and n. 2 (plurality opinion). We rejected the interest in remedying societal discrimination because it had no logical stopping point. *Id.*, at 276, 106 S. Ct. 1842, 90 L. Ed. 2d 260. We similarly rebuffed as inadequate the interest in providing role models to minority students and added that the notion that "black students are better off with black teachers could lead to the very system the Court rejected in *Brown* v. *Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954)." *Ibid.*

2

Grutter was a radical departure from our strict-scrutiny precedents. In *Grutter*, the University of Michigan Law School (Law School) claimed that it had a compelling reason to discriminate based on race. The reason it advanced did not concern protecting national security or remedying its own past discrimination. Instead, the Law School argued that it needed to discriminate in admissions decisions in order to obtain the "educational benefits that flow from a diverse student body." 539 U.S., at 317, 123 S. Ct. 2325, 156 L. Ed. 2d 304. Contrary to the very meaning of strict scrutiny, the Court *deferred* to the Law School's determination that this interest was sufficiently compelling to justify racial discrimination. *Id.*, at 325, 123 S. Ct. 2325, 156 L. Ed. 2d 304.

I dissented from that part of the Court's decision. I explained that "only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a 'pressing public necessity'" sufficient to satisfy strict scrutiny. *Id.*, at 353, 123 S. Ct. 2325, 156 L. Ed. 2d 304. Cf. *Lee* v. *Washington*, 390 U.S. 333, 334, 88 S. Ct. 994, 19 L. Ed. 2d 1212 (1968) (Black, J., concurring) (protecting prisoners from violence might justify narrowly tailored discrimination); *J. A. Croson*, *supra*, at 521, 109 S. Ct. 706, 102 L. Ed. 2d 854 (Scalia, J., concurring in judgment) ("At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb . . . can justify [racial discrimination]"). I adhere to that view today. As should be obvious, there is nothing "pressing" or "necessary" about obtaining whatever educational benefits may flow from racial diversity.

II

A

The University claims that the District Court found that it has a compelling interest in attaining "a diverse student body and the educational benefits flowing from such diversity." Brief for Respondents 18. The use of the conjunction, "and," implies that the University believes its discrimination furthers two distinct interests. The first is an interest in attaining diversity for its own sake. The second is an interest in attaining educational benefits that allegedly flow from diversity.

Attaining diversity for its own sake is a nonstarter. As even *Grutter* recognized, the pursuit of diversity as an end is nothing more than impermissible "racial balancing." 539 U.S., at 329-330, 123 S. Ct. 2325, 156 L. Ed. 2d 304 ("The Law School's interest is not simply 'to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin.' That would amount to outright racial balancing, which is patently unconstitutional" (quoting *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 307, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978); citation omitted)); see also *id.*, at 307, 98 S. Ct. 2733, 57 L. Ed. 2d 750 ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids"). Rather, diversity can only be the *means* by which the University obtains educational benefits; it cannot be an end pursued for its own sake. Therefore, the *educational benefits* allegedly produced by diversity must rise to the level of a compelling state interest in order for the program to survive strict scrutiny.

Unfortunately for the University, the educational benefits flowing from student body diversity—assuming they exist—hardly qualify as a compelling state interest. Indeed, the argument that educational benefits justify racial discrimination was advanced in support of racial segregation in the 1950's, but emphatically rejected by this Court. And just as the alleged educational benefits of segregation were insufficient to justify racial discrimination then, see *Brown* v. *Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), the alleged educational benefits of diversity cannot justify racial discrimination today.

Appendix D

1

Our desegregation cases establish that the Constitution prohibits public schools from discriminating based on race, even if discrimination is necessary to the schools' survival. In *Davis* v. *School Bd. of Prince Edward Cty.*, decided with *Brown*, *supra*, the school board argued that if the Court found segregation unconstitutional, white students would migrate to private schools, funding for public schools would decrease, and public schools would either decline in quality or cease to exist altogether. Brief for Appellees in *Davis* v. *School Bd. of Prince Edward Cty.*, O. T. 1952, No. 191, p. 30 (hereinafter Brief for Appellees in *Davis*) ("Virginians . . . would no longer permit sizeable appropriations for schools on either the State or local level; private segregated schools would be greatly increased in number and the masses of our people, both white and Negro, would suffer terribly. . . . [M]any white parents would withdraw their children from the public schools and, as a result, the program of providing better schools would be abandoned" (internal quotation marks omitted)). The true victims of desegregation, the school board asserted, would be black students, who would be unable to afford private school. See *id.*, at 31 ("[W]ith the demise of segregation, education in Virginia would receive a serious setback. Those who would suffer most would be the Negroes who, by and large, would be economically less able to afford the private school"); Tr. of Oral Arg. in *Davis* v. *School Bd. of Prince Edward Cty.*, O. T. 1954, No. 3, p. 208 ("What is worst of all, in our opinion, you impair the public school system of Virginia and the victims will be the children of both races, we think the Negro race worse

than the white race, because the Negro race needs it more by virtue of these disadvantages under which they have labored. We are up against the proposition: What does the Negro profit if he procures an immediate detailed decree from this Court now and then impairs or mars or destroys the public school system in Prince Edward County").[2]

Unmoved by this sky-is-falling argument, we held that segregation violates the principle of equality enshrined in the Fourteenth Amendment. See *Brown*, *supra*, at 495, 74 S. Ct. 686, 98 L. Ed. 873 ("[I]n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal");

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2. Similar arguments were advanced unsuccessfully in other cases as well. See, *e.g.*, Brief for Respondents in *Sweatt* v. *Painter*, O. T. 1949, No. 44, pp. 94-95 (hereinafter Brief for Respondents in *Sweatt*) ("[I]f the power to separate the students were terminated, . . . it would be as a bonanza to the private white schools of the State, and it would mean the migration out of the schools and the turning away from the public schools of the influence and support of a large number of children and of the parents of those children . . who are the largest contributors to the cause of public education, and whose financial support is necessary for the continued progress of public education. . . . Should the State be required to mix the public schools, there is no question but that a very large group of students would transfer, or be moved by their parents, to private schools with a resultant deterioration of the public schools" (internal quotation marks omitted)); Brief for Appellees in *Briggs* v. *Elliott*, O. T. 1952, No. 101, p. 27 (hereinafter Brief for Appellees in *Briggs*) ("[I]t would be impossible to have sufficient acceptance of the idea of mixed groups attending the same schools to have public education on that basis at all [I]t would eliminate the public schools in most, if not all, of the communities in the State").

see also *Allen* v. *County School Board.*, 249 F.2d 462, 465 (CA4 1957) (*per curiam*) ("The fact that the schools might be closed if the order were enforced is no reason for not enforcing it. A person may not be denied enforcement of rights to which he is entitled under the Constitution of the United States because of action taken or threatened in defiance of such rights"). Within a matter of years, the warning became reality: After being ordered to desegregate, Prince Edward County closed its public schools from the summer of 1959 until the fall of 1964. See R. Sarratt, The Ordeal of Desegregation 237 (1966). Despite this fact, the Court never backed down from its rigid enforcement of the Equal Protection Clause's antidiscrimination principle.

In this case, of course, Texas has not alleged that the University will close if it is prohibited from discriminating based on race. But even if it had, the foregoing cases make clear that even that consequence would not justify its use of racial discrimination. It follows, *a fortiori*, that the putative educational benefits of student body diversity cannot justify racial discrimination: If a State does not have a compelling interest in the *existence* of a university, it certainly cannot have a compelling interest in the supposed benefits that might accrue to that university from racial discrimination. See *Grutter*, 539 U.S., at 361, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (opinion of Thomas, J.) ("[A] marginal improvement in legal education cannot justify racial discrimination where the Law School has no compelling interest either in its existence or in its current educational and admissions policies"). If the Court were actually applying strict scrutiny, it would require Texas

either to close the University or to stop discriminating against applicants based on their race. The Court has put other schools to that choice, and there is no reason to treat the University differently.

2

It is also noteworthy that, in our desegregation cases, we rejected arguments that are virtually identical to those advanced by the University today. The University asserts, for instance, that the diversity obtained through its discriminatory admissions program prepares its students to become leaders in a diverse society. See, *e.g.*, Brief for Respondents 6 (arguing that student body diversity "prepares students to become the next generation of leaders in an increasingly diverse society"). The segregationists likewise defended segregation on the ground that it provided more leadership opportunities for blacks. See, *e.g.*, Brief for Respondents in *Sweatt* 96 ("[A] very large group of Northern Negroes [comes] South to attend separate colleges, suggesting that the Negro does not secure as well-rounded a college life at a mixed college, and that the separate college offers him positive advantages; that there is a more normal social life for the Negro in a separate college; that there is a greater opportunity for full participation and for the development of leadership; that the Negro is inwardly more 'secure' at a college of his own people"); Brief for Appellees in *Davis* 25-26 ("The Negro child gets an opportunity to participate in segregated schools that I have never seen accorded to him in non-segregated schools. He is important, he holds offices, he is accepted by his fellows, he is on athletic

teams, he has a full place there" (internal quotation marks omitted)). This argument was unavailing. It is irrelevant under the Fourteenth Amendment whether segregated or mixed schools produce better leaders. Indeed, no court today would accept the suggestion that segregation is permissible because historically black colleges produced Booker T. Washington, Thurgood Marshall, Martin Luther King, Jr., and other prominent leaders. Likewise, the University's racial discrimination cannot be justified on the ground that it will produce better leaders.

The University also asserts that student body diversity improves interracial relations. See, *e.g.*, Brief for Respondents 6 (arguing that student body diversity promotes "cross-racial understanding" and breaks down racial and ethnic stereotypes). In this argument, too, the University repeats arguments once marshaled in support of segregation. See, *e.g.*, Brief for Appellees in *Davis* 17 ("Virginia has established segregation in certain fields as a part of her public policy to prevent violence and reduce resentment. The result, in the view of an overwhelming Virginia majority, has been to improve the relationship between the different races"); *id.*, at 25 ("If segregation be stricken down, the general welfare will be definitely harmed . . . there would be more friction developed" (internal quotation marks omitted)); Brief for Respondents in *Sweatt* 93 ("Texas has had no serious breaches of the peace in recent years in connection with its schools. The separation of the races has kept the conflicts at a minimum"); *id.*, at 97-98 ("The legislative acts are based not only on the belief that it is the best way to provide education for both races, and the knowledge that separate schools are necessary to keep public support for the public

schools, but upon the necessity to maintain the public peace, harmony, and welfare"); Brief for Appellees in *Briggs* 32 ("The southern Negro, by and large, does not want an end to segregation in itself any more than does the southern white man. The Negro in the South knows that discriminations, and worse, can and would multiply in such event" (internal quotation marks omitted)). We flatly rejected this line of arguments in *McLaurin* v. *Oklahoma State Regents for Higher Ed.*, 339 U.S. 637, 70 S. Ct. 851, 94 L. Ed. 1149 (1950), where we held that segregation would be unconstitutional even if white students never tolerated blacks. *Id.*, at 641, 70 S. Ct. 851, 94 L. Ed. 1149 ("It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students. This we think irrelevant. There is a vast difference—a Constitutional difference—between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar"). It is, thus, entirely irrelevant whether the University's racial discrimination increases or decreases tolerance.

Finally, while the University admits that racial discrimination in admissions is not ideal, it asserts that it is a temporary necessity because of the enduring race consciousness of our society. See Brief for Respondents 53-54 ("Certainly all aspire for a colorblind society in which race does not matter . . . . But in Texas, as in America, 'our highest aspirations are yet unfulfilled'"). Yet again, the University echoes the hollow justifications advanced by the segregationists. See, *e.g.*, Brief for State of Kansas on Reargument in *Brown* v. *Board of Education*, O. T. 1953,

No. 1, p. 56 ("We grant that segregation may not be the ethical or political ideal. At the same time we recognize that practical considerations may prevent realization of the ideal"); Brief for Respondents in *Sweatt* 94 ("The racial consciousness and feeling which exists today the minds of many people may be regrettable and unjustified. Yet they are a reality which must be dealt with by the State if it is to preserve harmony and peace and at the same time furnish equal education to both groups"); *id.*, at 96 ("'[T]he *mores* of racial relationships are such as to rule out, for the present at least, any possibility of admitting white persons and Negroes to the same institutions'"); Brief for Appellees in *Briggs* 26-27 ("[I]t would be unwise in administrative practice . . . to mix the two races in the same schools at the present time and under present conditions"); Brief for Appellees on Reargument in *Briggs* v. *Elliott*, O. T. 1953, No. 2, p. 79 ("It is not 'racism' to be cognizant of the fact that mankind has struggled with race problems and racial tensions for upwards of sixty centuries"). But these arguments too were unavailing. The Fourteenth Amendment views racial bigotry as an evil to be stamped out, not as an excuse for perpetual racial tinkering by the State. See *DeFunis* v. *Odegaard*, 416 U.S. 312, 342, 94 S. Ct. 1704, 40 L. Ed. 2d 164 (1974) (Douglas, J., dissenting) ("The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized"). The University's arguments to this effect are similarly insufficient to justify discrimination.[3]

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3. While the arguments advanced by the University in defense of discrimination are the same as those advanced by the segregationists, one obvious difference is that the segregationists

The University's arguments today are no more persuasive than they were 60 years ago. Nevertheless, despite rejecting identical arguments in *Brown*, the Court in *Grutter* deferred to the University's determination that the diversity obtained by racial discrimination would yield educational benefits. There is no principled distinction between the University's assertion that diversity yields educational benefits and the segregationists' assertion that segregation yielded those same benefits. See *Grutter*, 539 U.S., at 365-366, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (opinion of Thomas, J.) ("Contained within today's majority opinion is the seed of a new constitutional justification for a concept I thought long and rightly rejected—racial segregation"). Educational benefits are a far cry from the truly compelling state interests that we previously required to justify use of racial classifications.

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argued that it was *segregation* that was necessary to obtain the alleged benefits, whereas the University argues that *diversity* is the key. Today, the segregationists' arguments would never be given serious consideration. But see M. Plocienniczak, Pennsylvania School Experiments with 'Segregation,' CNN (Jan. 27, 2011), http://www.cnn.com/2011/US/01/27/pennsylvania.segregation/index.html?_s=PM:US (as visited June 21, 2013, and available in Clerk of Court's case file). We should be equally hostile to the University's repackaged version of the same arguments in support of its favored form of racial discrimination.

Appendix D

B

My view of the Constitution is the one advanced by the plaintiffs in *Brown*: "[N]o State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." Tr. of Oral Arg. in *Brown* v. *Board of Education*, O. T. 1952, No. 8, p. 7; see also Juris. Statement in *Davis* v. *School Bd. of Prince Edward Cty.*, O. T. 1952, No. 191, p. 8 ("[W]e take the unqualified position that the Fourteenth Amendment has totally stripped the state of power to make race and color the basis for governmental action"); Brief for Appellants in *Brown* v. *Board of Education*, O. T. 1952, No. 8, p. 5 ("The Fourteenth Amendment precludes a state from imposing distinctions or classifications based upon race and color alone"); Brief for Appellants in Nos. 1, 2, and 4, and for Respondents in No. 10 on Reargument in *Brown* v. *Board of Education*, O. T. 1953, p. 65 ("That the Constitution is color blind is our dedicated belief"). The Constitution does not pander to faddish theories about whether race mixing is in the public interest. The Equal Protection Clause strips States of all authority to use race as a factor in providing education. All applicants must be treated equally under the law, and no benefit in the eye of the beholder can justify racial discrimination.

This principle is neither new nor difficult to understand. In 1868, decades before *Plessy*, the Iowa Supreme Court held that schools may not discriminate against applicants based on their skin color. In *Clark* v. *Board of Directors*, 24 Iowa 266 (1868), a school denied admission to a student

because she was black, and "public sentiment [was] opposed to the intermingling of white and colored children in the same schools." *Id.*, at 269. The Iowa Supreme Court rejected that flimsy justification, holding that "all the youths are equal before the law, and there is no discretion vested in the board . . . or elsewhere, to interfere with or disturb that equality." *Id.*, at 277. "For the courts to sustain a board of school directors . . . in limiting the rights and privileges of persons by reason of their [race], would be to sanction a plain violation of the spirit of our laws not only, but would tend to perpetuate the national differences of our people and stimulate a constant strife, if not a war of races." *Id.*, at 276. This simple, yet fundamental, truth was lost on the Court in *Plessy* and *Grutter*.

I would overrule *Grutter* and hold that the University's admissions program violates the Equal Protection Clause because the University has not put forward a compelling interest that could possibly justify racial discrimination.

III

While I find the theory advanced by the University to justify racial discrimination facially inadequate, I also believe that its use of race has little to do with the alleged educational benefits of diversity. I suspect that the University's program is instead based on the benighted notion that it is possible to tell when discrimination helps, rather than hurts, racial minorities. See *post*, at ___, 186 L. Ed. 2d, at 501 (Ginsburg, J., dissenting) ("[G]overnment actors, including state universities, need not be blind to the lingering effects of 'an overtly discriminatory past,'

the legacy of 'centuries of law-sanctioned inequality'"). But "[h]istory should teach greater humility." *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 609, 110 S. Ct. 2997, 111 L. Ed. 2d 445 (1990) (O'Connor, J., dissenting). The worst forms of racial discrimination in this Nation have always been accompanied by straight-faced representations that discrimination helped minorities.

A

Slaveholders argued that slavery was a "positive good" that civilized blacks and elevated them in every dimension of life. See, *e.g.*, Calhoun, Speech in the U.S. Senate, 1837, in P. Finkelman, Defending Slavery 54, 58-59 (2003) ("Never before has the black race of Central Africa, from the dawn of history to the present day, attained a condition so civilized and so improved, not only physically, but morally and intellectually. . . . [T]he relation now existing in the slaveholding States between the two [races], is, instead of an evil, a good—a positive good"); Harper, Memoir on Slavery, in The Ideology of Slavery 78, 115-116 (D. Faust ed. 1981) ("Slavery, as it is said in an eloquent article published in a Southern periodical work . . . 'has done more to elevate a degraded race in the scale of humanity; to tame the savage; to civilize the barbarous; to soften the ferocious; to enlighten the ignorant, and to spread the blessings of [C]hristianity among the heathen, than all the missionaries that philanthropy and religion have ever sent forth'"); Hammond, The Mudsill Speech, 1858, in Defending Slavery, *supra*, at 80, 87 ("They are elevated from the condition in which God first created them, by being made our slaves").

Appendix D

A century later, segregationists similarly asserted that segregation was not only benign, but good for black students. They argued, for example, that separate schools protected black children from racist white students and teachers. See, *e.g.*, Brief for Appellees in *Briggs* 33-34 ("'I have repeatedly seen wise and loving colored parents take infinite pains to force their little children into schools where the white children, white teachers, and white parents despised and resented the dark child, made mock of it, neglected or bullied it, and literally rendered its life a living hell. Such parents want their child to "fight" this thing out,—but, dear God, at what a cost! . . . We shall get a finer, better balance of spirit; an infinitely more capable and rounded personality by putting children in schools where they are wanted, and where they are happy and inspired, than in thrusting them into hells where they are ridiculed and hated'" (quoting DuBois, Does the Negro Need Separate Schools? 4 J. of Negro Educ. 328, 330-331 (1935))); Tr. of Oral Arg. in *Bolling* v. *Sharpe*, O. T. 1952, No. 413, p. 56 ("There was behind these [a]cts a kindly feeling [and] an intention to help these people who had been in bondage. And there was and there still is an intention by the Congress to see that these children shall be educated in a healthful atmosphere, in a wholesome atmosphere, in a place where they are wanted, in a place where they will not be looked upon with hostility, in a place where there will be a receptive atmosphere for learning for both races without the hostility that undoubtedly Congress thought might creep into these situations"). And they even appealed to the fact that many blacks agreed that separate schools were in the "best interests" of both races. See, *e.g.*, Brief for Appellees in *Davis* 24-25 ("'It

has been my experience, in working with the people of Virginia, including both white and Negro, that the customs and the habits and the traditions of Virginia citizens are such that they believe for the best interests of both the white and the Negro that the separate school is best'").

Following in these inauspicious footsteps, the University would have us believe that its discrimination is likewise benign. I think the lesson of history is clear enough: Racial discrimination is never benign. "'[B]enign' carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable." See *Metro Broadcasting*, 497 U.S., at 610, 110 S. Ct. 2997, 111 L. Ed. 2d 445 (O'Connor, J., dissenting). It is for this reason that the Court has repeatedly held that strict scrutiny applies to *all* racial classifications, regardless of whether the government has benevolent motives. See, *e.g.*, *Johnson*, 543 U.S., at 505, 125 S. Ct. 1141, 160 L. Ed. 2d 949 ("We have insisted on strict scrutiny in every context, even for so-called 'benign' racial classifications"); *Adarand*, 515 U.S., at 227, 115 S. Ct. 2097, 132 L. Ed. 2d 158 ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny"); *J. A. Croson*, 488 U.S., at 500, 109 S. Ct. 705, 102 L. Ed. 2d 854 ("Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice"). The University's professed good intentions cannot excuse its outright racial discrimination any more than such intentions justified the now denounced arguments of slaveholders and segregationists.

Appendix D

B

While it does not, for constitutional purposes, matter whether the University's racial discrimination is benign, I note that racial engineering does in fact have insidious consequences. There can be no doubt that the University's discrimination injures white and Asian applicants who are denied admission because of their race. But I believe the injury to those admitted under the University's discriminatory admissions program is even more harmful.

Blacks and Hispanics admitted to the University as a result of racial discrimination are, on average, far less prepared than their white and Asian classmates. In the University's entering class of 2009, for example, among the students admitted outside the Top Ten Percent plan, blacks scored at the 52d percentile of 2009 SAT takers nationwide, while Asians scored at the 93d percentile. Brief for Richard Sander et al. as *Amici Curiae* 3-4, and n. 4. Blacks had a mean GPA of 2.57 and a mean SAT score of 1524; Hispanics had a mean GPA of 2.83 and a mean SAT score of 1794; whites had a mean GPA of 3.04 and a mean SAT score of 1914; and Asians had a mean GPA of 3.07 and a mean SAT score of 1991.[4] *Ibid.*

Tellingly, neither the University nor any of the 73 *amici* briefs in support of racial discrimination has presented a shred of evidence that black and Hispanic students are able to close this substantial gap during their time at the

4. The lowest possible score on the SAT is 600, and the highest possible score is 2400.

University. Cf. Thernstrom & Thernstrom, Reflections on the Shape of the River, 46 UCLA L. Rev. 1583, 1605-1608 (1999) (discussing the failure of defenders of racial discrimination in admissions to consider the fact that its "beneficiaries" are underperforming in the classroom). "It is a fact that in virtually all selective schools . . . where racial preferences in admission is practiced, the majority of [black] students end up in the lower quarter of their class." S. Cole & E. Barber, Increasing Faculty Diversity: The Occupational Choices of High-Achieving Minority Students 124 (2003). There is no reason to believe this is not the case at the University. The University and its dozens of *amici* are deafeningly silent on this point.

Furthermore, the University's discrimination does nothing to increase the number of blacks and Hispanics who have access to a college education generally. Instead, the University's discrimination has a pervasive shifting effect. See T. Sowell, Affirmative Action Around the World 145-146 (2004). The University admits minorities who otherwise would have attended less selective colleges where they would have been more evenly matched. But, as a result of the mismatching, many blacks and Hispanics who likely would have excelled at less elite schools are placed in a position where underperformance is all but inevitable because they are less academically prepared than the white and Asian students with whom they must compete. Setting aside the damage wreaked upon the self-confidence of these overmatched students, there is no evidence that they learn more at the University than they would have learned at other schools for which they were better prepared. Indeed, they may learn less.

Appendix D

The Court of Appeals believed that the University needed to enroll more blacks and Hispanics because they remained "clustered in certain programs." 631 F.3d 213, 240 (CA5 2011) ("[N]early a quarter of the undergraduate students in [the University's] College of Social Work are Hispanic, and more than 10% are [black]. In the College of Education, 22.4% of students are Hispanic and 10.1% are [black]"). But racial discrimination may be the cause of, not the solution to, this clustering. There is some evidence that students admitted as a result of racial discrimination are more likely to abandon their initial aspirations to become scientists and engineers than are students with similar qualifications who attend less selective schools. See, *e.g.*, Elliott, Strenta, Adair, Matier, & Scott, The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions, 37 Research in Higher Educ. 681, 699-701 (1996).[5] These students may well drift towards less competitive majors because the mismatch caused by racial discrimination in admissions makes it difficult for them to compete in more rigorous majors.

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5. The success of historically black colleges at producing graduates who go on to earn graduate degrees in science and engineering is well documented. See, *e.g.*, National Science Foundation, J. Burrelli & A. Rapoport, InfoBrief, Role of HBCUs as Baccalaureate-Origin Institutions of Black S&E Doctorate Recipients 6 (2008) (Table 2) (showing that, from 1997-2006, Howard University had more black students who went on to earn science and engineering doctorates than any other undergraduate institution, and that 7 other historically black colleges ranked in the top 10); American Association of Medical Colleges, Diversity in Medical Education: Facts & Figures 86 (2012) (Table 19) (showing that, in 2011, Xavier University had more black students who went on to earn medical degrees than any other undergraduate institution and that Howard University was second).

Moreover, the University's discrimination "stamp[s] [blacks and Hispanics] with a badge of inferiority." *Adarand*, 515 U.S., at 241, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (opinion of Thomas, J.). It taints the accomplishments of all those who are admitted as a result of racial discrimination. Cf. J. McWhorter, Losing the Race: Self-Sabotage in Black America 248 (2000) ("I was never able to be as proud of getting into Stanford as my classmates could be. . . . [H]ow much of an achievement can I truly say it was to have been a good enough *black* person to be admitted, while my colleagues had been considered good enough *people* to be admitted"). And, it taints the accomplishments of all those who are the same race as those admitted as a result of racial discrimination. In this case, for example, most blacks and Hispanics attending the University were admitted without discrimination under the Top Ten Percent plan, but no one can distinguish those students from the ones whose race played a role in their admission. "When blacks [and Hispanics] take positions in the highest places of government, industry, or academia, it is an open question . . . whether their skin color played a part in their advancement." See *Grutter*, 539 U.S., at 373, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (opinion of Thomas, J.). "The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed 'otherwise unqualified,' or it did not, in which case asking the question itself unfairly marks those . . . who would succeed without discrimination." *Ibid.* Although cloaked in good intentions, the University's racial tinkering harms the very people it claims to be helping.

Appendix D

* * *

For the foregoing reasons, I would overrule *Grutter*. However, because the Court correctly concludes that the Court of Appeals did not apply strict scrutiny, I join its opinion.

Appendix D

SUPREME COURT OF THE UNITED STATES

No. 11-345

ABIGAIL NOEL FISHER,

Petitioner

v.

UNIVERSITY OF TEXAS AT AUSTIN *et al.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October 10, 2012, Argued
June 24, 2013, Decided

JUSTICE GINSBURG, dissenting.

The University of Texas at Austin (University) is candid about what it is endeavoring to do: It seeks to achieve student-body diversity through an admissions policy patterned after the Harvard plan referenced as exemplary in Justice Powell's opinion in *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 316-317, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (1978). The University has steered clear of a quota system like the one struck down in *Bakke*, which excluded all nonminority candidates from competition for a fixed number of seats. See *id.*, at 272-275, 315, 319-320, 98 S. Ct. 2733, 57 L. Ed. 2d 750 (opinion of Powell, J.). See

also *Gratz* v. *Bollinger*, 539 U.S. 244, 293, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003) (Souter, J., dissenting) ("Justice Powell's opinion in [*Bakke*] rules out a racial quota or set-aside, in which race is the sole fact of eligibility for certain places in a class."). And, like so many educational institutions across the Nation,[1] the University has taken care to follow the model approved by the Court in *Grutter* v. *Bollinger*, 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003). See 645 F. Supp. 2d 587, 609 (WD Tex. 2009) ("[T]he parties agree [that the University's] policy was based on the [admissions] policy [upheld in *Grutter*].").

Petitioner urges that Texas' Top Ten Percent Law and race-blind holistic review of each application achieve significant diversity, so the University must be content with those alternatives. I have said before and reiterate here that only an ostrich could regard the supposedly neutral alternatives as race unconscious. See *Gratz*, 539 U.S., at 303-304, n. 10, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (dissenting opinion). As Justice Souter observed, the vaunted alternatives suffer from "the disadvantage of deliberate obfuscation." *Id.*, at 297-298, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (dissenting opinion).

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1. See Brief for Amherst College et al. as *Amici Curiae* 33-35; Brief for Association of American Law Schools as *Amicus Curiae* 6; Brief for Association of American Medical Colleges et al. as *Amici Curiae* 30-32; Brief for Brown University et al. as *Amici Curiae* 2-3, 13; Brief for Robert Post et al. as *Amici Curiae* 24-27; Brief for Fordham University et al. as *Amici Curiae* 5-6; Brief for University of Delaware et al. as *Amici Curiae* 16-21.

Texas' percentage plan was adopted with racially segregated neighborhoods and schools front and center stage. See House Research Organization, Bill Analysis, HB 588, pp. 4-5 (Apr. 15, 1997) ("Many regions of the state, school districts, and high schools in Texas are still predominantly composed of people from a single racial or ethnic group. Because of the persistence of this segregation, admitting the top 10 percent of all high schools would provide a diverse population and ensure that a large, well qualified pool of minority students was admitted to Texas universities."). It is race consciousness, not blindness to race, that drives such plans.[2] As for holistic review, if universities cannot explicitly include race as a factor, many may "resort to camouflage" to "maintain their minority enrollment." *Gratz*, 539 U.S., at 304, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (Ginsburg, J., dissenting).

I have several times explained why government actors, including state universities, need not be blind to the lingering effects of "an overtly discriminatory past," the legacy of "centuries of law-sanctioned inequality." *Id.*, at 298, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (dissenting opinion). See also *Adarand Constructors, Inc.* v. *Peña*, 515

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2. The notion that Texas' Top Ten Percent Law is race neutral calls to mind Professor Thomas Reed Powell's famous statement: "If you think that you can think about a thing inextricably attached to something else without thinking of the thing which it is attached to, then you have a legal mind." T. Arnold, The Symbols of Government 101 (1935) (internal quotation marks omitted). Only that kind of legal mind could conclude that an admissions plan specifically designed to produce racial diversity is not race conscious.

U.S. 200, 272-274, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995) (dissenting opinion). Among constitutionally permissible options, I remain convinced, "those that candidly disclose their consideration of race [are] preferable to those that conceal it." *Gratz*, 539 U.S., at 305, n. 11, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (dissenting opinion).

Accordingly, I would not return this case for a second look. As the thorough opinions below show, 631 F.3d 213 (CA5 2011); 645 F. Supp. 2d 587, the University's admissions policy flexibly considers race only as a "factor of a factor of a factor of a factor" in the calculus, *id.*, at 608; followed a yearlong review through which the University reached the reasonable, good-faith judgment that supposedly race-neutral initiatives were insufficient to achieve, in appropriate measure, the educational benefits of student-body diversity, see 631 F.3d, at 225-226; and is subject to periodic review to ensure that the consideration of race remains necessary and proper to achieve the University's educational objectives, see *id.*, at 226.[3] Justice Powell's opinion in *Bakke* and the Court's

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3. As the Court said in *Grutter* v. *Bollinger*, 539 U.S. 306, 339, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003), "[n]arrow tailoring . . . require[s] serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." But, *Grutter* also explained, it does not "require a university to choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to members of all racial groups." *Ibid.* I do not read the Court to say otherwise. See *ante*, at ___, 186 L. Ed. 2d, at 487 (acknowledging that, in determining whether a race-conscious admissions policy satisfies *Grutter*'s narrow-tailoring requirement, "a court can take account of a university's experience and expertise in adopting or rejecting certain admissions processes").

decision in *Grutter* require no further determinations. See *Grutter*, 539 U.S., at 333-343, 123 S. Ct. 2325, 156 L. Ed. 2d 304; *Bakke*, 438 U.S., at 315-320, 98 S. Ct. 2733, 57 L. Ed. 2d 750.

The Court rightly declines to cast off the equal protection framework settled in *Grutter*. See *ante*, at ___, 186 L. Ed. 2d, at 483. Yet it stops short of reaching the conclusion that framework warrants. Instead, the Court vacates the Court of Appeals' judgment and remands for the Court of Appeals to "assess whether the University has offered sufficient evidence [to] prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity." *Ante*, at ___, 186 L. Ed. 2d, at 488. As I see it, the Court of Appeals has already completed that inquiry, and its judgment, trained on this Court's *Bakke* and *Grutter* pathmarkers, merits our approbation.[4]

* * *

For the reasons stated, I would affirm the judgment of the Court of Appeals.

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4. Because the University's admissions policy, in my view, is constitutional under *Grutter*, there is no need for the Court in this case "to revisit whether all governmental classifications by race, whether designed to benefit or to burden a historically disadvantaged group, should be subject to the same standard of judicial review." 539 U.S., at 346, 123 S. Ct. 2325, 156 L. Ed. 2d 304, n. (Ginsburg, J., concurring). See also *Gratz* v. *Bollinger*, 539 U.S. 244, 301, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003) (Ginsburg, J., dissenting) ("Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated.").

APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, DATED JANUARY 18, 2011

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

631 F.3d 213, 264 Ed. Law Rep. 564

No. 09–50822.
Jan. 18, 2011.

Abigail Noel FISHER; Rachel Multer Michalewicz,

Plaintiffs–Appellants,

v.

UNIVERSITY OF TEXAS AT AUSTIN; David B. Pryor, Executive Vice Chancellor for Academic Affairs in His Official Capacity; William Powers, Jr., President of the University of Texas at Austin in His Official Capacity; Board of Regents of the University of Texas System; R. Steven Hicks, as Member of the Board of Regents in His Official Capacity; William Eugene Powell, as Member of the Board of Regents in His Official Capacity; James R. Huffines, as Member of the Board of Regents in His Official Capacity; Janiece Longoria, as Member of the Board of Regents in Her Official Capacity; Colleen McHugh, as Member of the Board of Regents in Her Official Capacity; Robert L. Stillwell, as Member of the Board of Regents in His Official Capacity; James D. Dannenbaum, as Member

of the Board of Regents in His Official Capacity; Paul Foster, as Member of the Board of Regents in His Official Capacity; Printice L. Gary, as Member of the Board of Regents in His Official Capacity; Kedra Ishop, Vice Provost and Director of Undergraduate Admissions in Her Official Capacity; Francisco G. Cigarroa, M.D., Interim Chancellor of the University of Texas System in His Official Capacity,

Defendants–Appellees.

Appeal from the United States District Court for the Western District of Texas.

Before *KING*, *HIGGINBOTHAM* and GARZA, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

We consider a challenge to the use of race in undergraduate admissions at the University of Texas at Austin. While the University has confined its explicit use of race to the elements of a program approved by the Supreme Court in *Grutter v. Bollinger*,[1] UT's program acts upon a university applicant pool shaped by a legislatively-mandated parallel diversity initiative that guarantees admission to Texas students in the top ten percent of their high school class. The ever-increasing number of minorities gaining admission under this Top Ten Percent Law casts a shadow on the horizon to the otherwise-plain

1. 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003).

legality of the *Grutter*-like admissions program, the Law's own legal footing aside. While the Law's ultimate fate is not the fare of this suit, the challenge to the *Grutter* plan here rests upon the intimate ties and ultimate confluence of the two initiatives. Today we affirm the constitutionality of the University's program as it existed when Appellants applied and were denied admission.

Abigail Fisher and Rachel Michalewicz, both Texas residents, were denied undergraduate admission to the University of Texas at Austin for the class entering in Fall 2008. They filed this suit alleging that UT's admissions policies discriminated against them on the basis of race in violation of their right to equal protection under the Fourteenth Amendment and federal civil rights statutes.[2] They sought damages as well as injunctive and declaratory relief. Proceeding with separate phases of liability and remedy, the district court, in a thoughtful opinion, found no liability and granted summary judgment to the University.

The procedural posture of this case defines the scope of our review. There are no class claims and both students deny intention to reapply to UT.[3] It follows that Fisher and Michalewicz lack standing to seek injunctive

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2. *Fisher v. Univ. of Tex. at Austin*, 645 F.Supp.2d 587, 590 (W.D.Tex.2009) (citing U.S. CONST. amend. XIV, § 1, and 42 U.S.C. §§ 1981, 1983, and 2000d *et seq.*).

3. Like all Texas residents, Appellants could attend UT Austin as transfer students if they first enrolled in a participating UT system school and met the standards required by the Coordinated Admissions Program, discussed in greater detail below. Instead, Appellants permanently enrolled at other institutions.

or forward-looking declaratory relief.[4] This principle is rote. To obtain forward-looking equitable remedies, a plaintiff must show she faces imminent threat of future injury.[5] Without that threat, these two applicants only have standing to challenge their rejection and to seek money damages for their injury.[6]

Our focus will be upon the process employed by UT to admit freshmen when Fisher and Michalewicz applied for the class entering Fall 2008, looking to earlier and later years only as they illuminate the rejection of these two applicants.[7] Our task is burdened by the reality that we are examining a dynamic program administered by a large university subject to government oversight. Indeed, the first of UT's periodic five-year reviews was to begin in the fall of 2009, a review that must engage an array of variables, including an ever-present question of whether to adjust the percentage of students admitted under the two diversity initiatives.

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4. *See DeFunis v. Odegaard*, 416 U.S. 312, 319, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974) (per curiam) (dismissing for lack of standing a suit that challenged a law school admissions policy because the plaintiff would "never again be required to run the gantlet of the Law School's admissions process").

5. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 201–11, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995); *City of L.A. v. Lyons*, 461 U.S. 95, 105–10, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983).

6. *See Lyons*, 461 U.S. at 105–07, 103 S.Ct. 1660.

7. *Cf. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 711 n. 1, 127 S.Ct. 2738, 168 L.Ed.2d 508 (relying on data from before the district court record closed, even after newer data had become available).

Appendix E

I. *GRUTTER V. BOLLINGER*

We begin with *Grutter v. Bollinger* because UT's race-conscious admissions procedures were modeled after the program it approved. In rejecting constitutional challenges to the University of Michigan Law School's admissions program, *Grutter* held that the Equal Protection Clause did not prohibit a university's "narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body."[8] Mapping on *Grutter*, UT evaluates each application using a holistic, multi-factor approach, in which race is but one of many considerations. In granting summary judgment to UT, the district court found that "it would be difficult for UT to construct an admissions policy that more closely resembles the policy approved by the Supreme Court in *Grutter*," and "as long as *Grutter* remains good law, UT's current admissions program remains constitutional."[9] Laying aside the Top Ten Percent Law, that observation is indisputably sound.[10]

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8. *Grutter*, 539 U.S. at 343, 123 S.Ct. 2325.

9. *Fisher*, 645 F.Supp.2d at 612–13; *see also id.* at 613 ("If the Plaintiffs are right, *Grutter* is wrong." (internal quotation marks omitted)).

10. In practice, the admissions systems of Michigan Law School and UT differ because UT's automatic admission of the top ten percent of Texas high school seniors "largely dominates [its] admissions process." *Fisher*, 645 F.Supp.2d at 595. We discuss the impact of the Top Ten Percent Law in greater detail below.

Appendix E

A

Grutter embraced the diversity interest articulated twenty-five years earlier by Justice Powell, who wrote separately in *Regents of the University of California v. Bakke*.[11] This vision of diversity encompassed a broad array of qualifications and characteristics where race was a single but important element.[12] The Michigan Law School designed its admissions program to achieve this broad diversity, selecting students with varied backgrounds and experiences—including varied racial backgrounds—who would respect and learn from one another.[13] The Court explained:

> [The Law School's] policy makes clear there are many possible bases for diversity admissions, and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields.[14]

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11. 438 U.S. 265, 269, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.).

12. *See Grutter*, 539 U.S. at 325, 123 S.Ct. 2325 (citing *Bakke*, 438 U.S. at 315, 98 S.Ct. 2733 (opinion of Powell, J.)).

13. *Id.* at 314, 123 S.Ct. 2325.

14. *Id.* at 338, 123 S.Ct. 2325 (brackets and internal quotation marks omitted).

The Law School's policy also reaffirmed its "longstanding commitment" to "one particular type of diversity, that is, racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African–Americans, Hispanics and Native Americans, who without this commitment might not be represented in [the] student body in meaningful numbers."[15]

In an effort to ensure representation of minorities, the Law School sought to enroll a "critical mass" of minority students, which would result in increased minority engagement in the classroom and enhanced minority contributions to the character of the School. The *Grutter* Court endorsed this goal, holding that diversity, including seeking a critical mass of minority students, is "a compelling state interest that can justify the use of race in university admissions."[16]

That the concept of critical mass bears a simple but deceptive label is evidenced by the division of the Justices over its meaning. In his dissent, Chief Justice Rehnquist saw critical mass as only the minimum level necessary "[t]o ensure that the[ ] minority students do not feel isolated or like spokespersons for their race; to provide adequate opportunities for the type of interaction upon which the educational benefits of diversity depend; and to challenge all students to think critically and reexamine

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15. *Id.* at 316, 123 S.Ct. 2325 (internal quotation marks omitted).

16. *Id.* at 325, 123 S.Ct. 2325; *see id.* at 329–30, 123 S.Ct. 2325.

stereotypes."[17] On this view, critical mass is defined only as a proportion of the student body, and the percentage that suffices for one minority group should also suffice for another group.

In contrast, Justice O'Connor, writing for the Court, explained that critical mass must be "defined by reference to the educational benefits that diversity is designed to produce."[18] Her opinion recognizes that universities do more than simply impart knowledge to their students. Synthesizing, we find at least three distinct educational objectives served by the diversity she envisioned:

1. **Increased Perspectives.** Justice O'Connor observed that including diverse perspectives improves the quality of the educational process because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds."[19] In this respect, *Grutter* echoes Justice Powell's recognition in *Bakke* that it is "essential to the quality of higher education" that a university be able to pursue "[t]he atmosphere of speculation, excitement and creation" that is "promoted by a diverse student body."[20] Indeed, diversity often brings not just excitement, but

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17. *Id.* at 380, 123 S.Ct. 2325 (Rehnquist, C.J., dissenting).

18. *Id.* at 329–30, 123 S.Ct. 2325 (opinion of the Court).

19. *Id.* at 330, 123 S.Ct. 2325 (internal quotation marks omitted).

20. 438 U.S. at 312, 98 S.Ct. 2733 (opinion of Powell, J.) (internal quotation marks omitted).

valuable knowledge as well. "[A] student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a [university] experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity."[21]

2. **Professionalism.** The majority pointed to "numerous studies" showing that "student body diversity ... better prepares [students] as professionals."[22] The Court has "repeatedly acknowledged the overriding importance of preparing students for work and citizenship,"[23] and today's students must be prepared to work within "an increasingly diverse workforce."[24] Indeed, "major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[25] A diverse student body serves this end by "promot[ing] cross-racial understanding, help[ing] to break down racial stereotypes, and enabl[ing] students to better understand persons of different races."[26]

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21. *Id.* at 314, 123 S.Ct. 2325.

22. *Grutter*, 539 U.S. at 330, 123 S.Ct. 2325 (internal quotation marks omitted).

23. *Id.* (internal quotation marks omitted).

24. *Id.* (internal quotation marks omitted).

25. *Id.*

26. *Id.* (internal quotation marks and brackets omitted).

3. Civic Engagement. The Court recognized that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."[27] A diverse student body is crucial for fostering this ideal of civic engagement, because "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."[28] Maintaining a visibly open path to leadership demands that "[a]ccess to [higher] education ... be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America."[29] Each member of society "must

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27. *Id.* at 332, 123 S.Ct. 2325.

28. *Id.*

29. *Id.* at 332–33, 123 S.Ct. 2325. The Court further explained:

> [E]ducation [is] pivotal to sustaining our political and cultural heritage with a fundamental role in maintaining the fabric of society .... [T]he diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity. The United States, as *amicus curiae*, affirms that "[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective." And, "[n]owhere is the importance of such

have confidence in the openness and integrity of the educational institutions that provide this training."[30] Further, efforts to educate and to encourage future leaders from previously underrepresented backgrounds will serve not only to inspire, but to actively engage with many woefully underserved communities, helping to draw them back into our national fabric.

B

Recognizing the pursuit of diversity, including racial diversity, to be a compelling interest in higher education, *Grutter* endorsed the right of public universities to increase enrollment of underrepresented minorities. *Grutter* also cautioned that, while it accepted diversity as a compelling interest, any sorting of persons on the basis of race must be by measures narrowly tailored to the interest at stake.

As we read the Court, a university admissions program is narrowly tailored only if it allows for individualized consideration of applicants of all races.[31] Such consideration does not define an applicant by race but instead ensures

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openness more acute than in the context of higher education."

Id. at 331–32, 123 S.Ct. 2325 (final two alterations in original; citations and some internal quotation marks omitted).

30. *Id.* at 332, 123 S.Ct. 2325.

31. *Id.* at 337, 123 S.Ct. 2325.

that she is valued for all her unique attributes. Rather than applying fixed stereotypes of ways that race affects students' lives, an admissions policy must be " 'flexible enough to consider all pertinent elements of diversity in *light of* the particular qualifications of each applicant.' "[32] As the Supreme Court later summarized, "The entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group."[33] Thus, a university admissions policy is more likely to be narrowly tailored if it contemplates that a broad range of qualities and experiences beyond race will be important contributions to diversity and as such are appropriately considered in admissions decisions.[34]

Because a race-conscious admissions program is constitutional only if holistic, flexible, and individualized, a university may not establish a quota for minority applicants, nor may it evaluate minority applications "on separate admissions tracks."[35] The "racial-set-aside program" rejected by Justice Powell in *Bakke* ran afoul of these related prohibitions because it reserved 16 out of 100 seats

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32. *Id.* (quoting *Bakke*, 438 U.S. at 317, 98 S.Ct. 2733 (opinion of Powell, J.)).

33. *Parents Involved*, 551 U.S. at 722, 127 S.Ct. 2738; *see also Grutter*, 539 U.S. at 337, 123 S.Ct. 2325 ("The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.").

34. *Grutter*, 539 U.S. at 338, 123 S.Ct. 2325.

35. *Id.* at 334, 123 S.Ct. 2325 (citing *Bakke*, 438 U.S. at 315–16, 98 S.Ct. 2733 (opinion of Powell, J.)).

for members of certain minority groups.[36] A university also may not award a fixed number of bonus points to minority applicants.[37] That was the lesson of *Grutter*'s companion case, *Gratz v. Bollinger*, in which the Court struck down the University of Michigan's undergraduate admissions program because it automatically awarded a fixed number of admissions points to all underrepresented minority applicants, resulting in a group-based admissions boost.[38]

Both *Bakke* and *Gratz* firmly rejected group treatment, insisting that the focus be upon individuals and that an applicant's achievements be judged in the context of one's personal circumstances, of which race is only a part. So deployed, a white applicant raised by a single parent who did not attend high school and struggled paycheck to paycheck and a minority child of a successful cardiovascular surgeon may both claim adversity, but the personal hurdles each has cleared will not be seen to be of the same height.

C

Finally, *Grutter* requires that any race-conscious measures must have a "logical end point" and be "limited

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36. *Id.* at 322, 123 S.Ct. 2325; *see Bakke*, 438 U.S. at 289, 98 S.Ct. 2733 (opinion of Powell, J.).

37. *Gratz v. Bollinger*, 539 U.S. 244, 271–72, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003).

38. *Id.*

in time."[39] This durational requirement can be satisfied by sunset provisions or by periodic reviews to reconsider whether there are feasible race-neutral alternatives that would achieve diversity interests " 'about as well.'"[40] In this respect, *Grutter* is best seen not as an unqualified endorsement of racial preferences, but as a transient response to anemic academic diversity. As Justice O'Connor observed, "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[41]

II. HISTORY OF THE UNIVERSITY'S ADMISSIONS POLICIES

Justice O'Connor's vision may prove to be more aspirational than predictive. Regardless, universities will construct admissions programs wedded to their missions, which include bringing both meritorious and diverse students to campus. Each year, UT receives applications from approximately four times more students than it can enroll.[42] Over the past two decades, UT has repeatedly revised its admissions procedures to reflect its calculus of educational values while navigating judicial decisions and legislative mandates.

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39. *Grutter*, 539 U.S. at 342, 123 S.Ct. 2325.

40. *Id.* at 339, 123 S.Ct. 2325 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n. 6, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986)).

41. *Id.* at 343, 123 S.Ct. 2325.

42. *Fisher*, 645 F.Supp.2d at 590.

Appendix E

A

Until 1996, UT selected students using two metrics. The first measure, still employed today, is the Academic Index ("AI"), a computation based on the student's high school class rank, standardized test scores, and the extent to which the applicant exceeded UT's required high school curriculum.[43] Perceiving that AI alone would produce a class with unacceptably low diversity levels, UT considered a second element for admissions—race. These measures combined resulted in UT admitting more than 90% of applicants who were ranked in the top ten percent of their high school class.[44]

There were then no clear legal limits on a university's use of race in admissions. The Supreme Court decided *Bakke* in 1978 but its guidance came in a fractured decision, leaving a quarter century of uncertainty.[45] The record

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43. *Id.* at 596.

44. Marta Tienda et al., *Closing the Gap?: Admissions & Enrollment at the Texas Public Flagships Before and After Affirmative Action* 52 tbl.5 (Tex. Higher Educ. Opportunity Project Working Paper), *available at* http:// theop. princeton. edu/ workingpapers. html. Unlike the current Top Ten Percent Law, UT's earlier policies did not *mandate* the admission of all top ten percent students. Thus, even though a top ranking at a predominantly minority high school would contribute to a higher AI score, the AI alone could not effectively serve as a proxy for race because, on average, minorities received lower standardized test scores.

45. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). Four Justices would have held that

does not detail precisely how race factored in admissions decisions during this time, but it is undisputed that race was considered directly and was often a controlling factor in admission.[46] Under this race-conscious admissions policy, the freshman class entering in Fall 1993 included 5,329 students, of whom 238 were African-American (4.5% of the overall class) and 832 were Hispanic (15.6%).[47]

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universities have broad authority to consider race in admissions in order to "remedy disadvantage cast on minorities by past racial prejudice." *Id.* at 325, 98 S.Ct. 2733 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ.). Four other Justices would have held that Title VI of the Civil Rights Act of 1964 bars federally funded universities from making any admissions decisions on the basis of race. *Id.* at 417–18, 98 S.Ct. 2733 (opinion of Stevens, J., joined by Burger, C.J., and Stewart and Rehnquist, JJ.). Justice Powell cast the decisive vote in a separate opinion—not joined in full by any other Justice—that invalidated the racial set-aside in the admissions program then before the Court, but reasoned that it would be constitutional for a university to consider race as one facet of diversity in a flexible review that treated each applicant as an individual. *Id.* at 316–19, 98 S.Ct. 2733 (opinion of Powell, J.). Because none of these positions carried the support of a majority of the Court, it was not completely clear which (if any) of these rationales was controlling. *See Grutter*, 539 U.S. at 322–25, 123 S.Ct. 2325 (2003) (recounting this history and the subsequent confusion among lower courts).

46. Records do reflect that at UT's law school during this time, minority and nonminority applicants were reviewed by separate admissions committees and were subject to different grade and test-score cutoffs. *See Hopwood v. Texas*, 78 F.3d 932, 935–38 (5th Cir.1996).

47. Univ. of Tex. at Austin, *1998–1999 Statistical Handbook*. Minority enrollment was fairly consistent from 1989 until 1993,

Appendix E

B

Race-conscious admissions ended in 1996 with *Hopwood v. Texas*, when a panel of this court struck down the use of race-based criteria in admissions decisions at UT's law school.[48] A majority of that panel held that diversity in education was not a compelling government interest,[49] a conclusion the Texas Attorney General interpreted as prohibiting the use of race as a factor in admissions by any undergraduate or graduate program at Texas state universities.[50]

Beginning with the 1997 admissions cycle, UT deployed a Personal Achievement Index ("PAI") to be used with the Academic Index. In contrast to the mechanical formulas used to calculate the AI, the PAI was meant "to

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with some slight decreases in 1994 and 1995. UT publishes its *Statistical Handbook* annually, and these handbooks are cited throughout the district court record. *See* Univ. of Tex. at Austin Office of Admissions, *Diversity Levels of Undergraduate Classes at The University of Texas at Austin 1996–2002* (2003) (Dist. Ct. Dkt. No. 96, Tab 8, Ex. B), at 5, 6; Univ. of Tex. at Austin, *Proposal to Consider Race and Ethnicity in Admissions* (2004) (Dist. Ct. Dkt. No. 96, Tab 11, Ex. A), at 30; Univ. of Tex. at Austin Office of Admissions, *2008 Top Ten Percent Report* (Dist. Ct. Dkt. No. 94, Ex. 9), at 4 [hereinafter *2008 Top Ten Percent Report*]. Handbooks dating back to 1998 are available online at http:// www. utexas. edu/ academic/ ima/ stat_ handbook/.

48. 78 F.3d 932 (1996).

49. *Id.* at 944–48.

50. *See* Tex. Att'y Gen. Letter Op. No. 97–001 (1997).

identify and reward students whose merit as applicants was not adequately reflected by their class rank and test scores."[51] Although facially race-neutral, the PAI was in part designed to increase minority enrollment; many of the PAI factors disproportionately affected minority applicants.[52]

UT also implemented other facially "race-neutral" policies that, together with the AI and PAI, remain in use today. It created targeted scholarship programs to increase its yield among minority students, expanded the quality and quantity of its outreach efforts to high schools in underrepresented areas of the state, and focused additional attention and resources on recruitment in low-performing schools.[53]

Despite these efforts, minority presence at UT decreased immediately. Although the 1996 admissions decisions were not affected by *Hopwood*, the publicity from the case impacted the number of admitted minorities who chose to enroll. In 1997, fewer minorities applied to UT than in years past. The number of African–American and Hispanic applicants dropped by nearly a quarter, while the total number of University applicants decreased by only 13%.[54] This decrease in minority applicants had a

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51. *Fisher*, 645 F.Supp.2d at 591.

52. *Id.* at 591–92.

53. *Id.* at 592.

54. *Diversity Levels of Undergraduate Classes at The University of Texas at Austin 1996–2002* (2003) (Dist. Ct. Dkt. No. 96, Tab 8, Ex. B), at 6.

corresponding effect on enrollment. Compared to 1995, African–American enrollment for 1997 dropped almost 40% (from 309 to 190 entering freshmen) while Hispanic enrollment decreased by 5% (from 935 to 892 entering freshmen). In contrast, Caucasian enrollment increased by 14%, and Asian–American enrollment increased by 20%.[55]

C

In 1997, the Texas legislature responded to the *Hopwood* decision by enacting the Top Ten Percent Law, still in effect.[56] The law altered UT's preexisting policy and mandated that Texas high school seniors in the top ten percent of their class be automatically admitted to any Texas state university.

In its first year, the Top Ten Percent Law succeeded in increasing minority percentages at UT. African–American enrollment rose from 2.7% to 3.0% and Hispanic enrollment rose from 12.6% to 13.2%. However, the absolute number of minorities remained stable as a result of a smaller freshman class. Over time, both the number and percentage of enrolled Hispanics and African–Americans increased. The entering freshman

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55. *1998–1999 Statistical Handbook.*

56. TEX. EDUC.CODE § 51.803 (1997). The Top Ten Percent Law was amended, during the course of this litigation, to cap the number of students guaranteed admission at UT Austin to 75% of the seats available to Texas residents. *Id.* § 51.803(a–1) (2010). The cap is effective starting with admissions to the Fall 2011 entering class and is currently scheduled to end with admissions to the Fall 2015 entering class.

class of 2004, the last admitted without the *Grutter*-like plan, was 4.5% African–American (309 students), 16.9% Hispanic (1,149 students), and 17.9% Asian–American (1,218 students) in a class of 6,796 students.[57]

The Top Ten Percent Law did not by its terms admit students on the basis of race, but underrepresented minorities were its announced target and their admission a large, if not primary, purpose. In 2004, among freshmen who were Texas residents, 77% of the enrolled African–American students and 78% of the Hispanic students had been admitted under the Top Ten Percent Law, compared to 62% of Caucasian students.[58] These numbers highlight the contribution of the Top Ten Percent Law to increasing minority enrollment, but they also reflect a trade-off implicit in the Law: the increase rested heavily on the pass from standardized testing offered by the Top Ten Percent Law. After implementation of the Law, the likelihood of acceptance for African–American and Hispanic students in the second decile of their high school class, who were without the benefits of the pass from standardized testing, declined. Meanwhile, the acceptance probability of similarly situated Caucasian students increased.[59]

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57. *2008 Top Ten Percent Report* at 6 tbl.1.

58. *Id.* at 8; *see also Fisher*, 645 F.Supp.2d at 593 (reporting statistics for total admitted applicants, both Texas and non-Texas residents).

59. Tienda et al., *supra* note 44, at 52 tbl.5.

Appendix E

D

Hopwood's prohibitions ended after the 2004 admissions cycle with the Supreme Court's 2003 decision in *Grutter*.[60] In August 2003, the University of Texas Board of Regents authorized the institutions within the University of Texas system to examine "whether to consider an applicant's race and ethnicity" in admissions "in accordance with the standards enunciated in" *Grutter*.[61]

As part of its examination, UT commissioned two studies to explore whether the University was enrolling a critical mass of underrepresented minorities. The first study examined minority representation in undergraduate classes, focusing on classes of "participatory size," which it defined as between 5 and 24 students. UT analyzed these classes, which included most of the undergraduate courses, because they offered the best opportunity for robust classroom discussion, rich soil for diverse interactions. According to the study, 90% of these smaller classes in Fall 2002 had either one or zero African–American students, 46% had one or zero Asian–American students, and 43% had one or zero Hispanic students.[62]

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60. 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003).

61. Minutes of the Board of Regents of the University of Texas at Austin, Meeting No. 969, Aug. 6–7, 2003 (Dist. Ct. Dkt. No. 94, Ex. 19, Tab A), at 4.

62. *Fisher*, 645 F.Supp.2d at 593. Classes with only one student of a given minority were thought to be just as troubling as classes with zero students of that minority because a single

A later retabulation, which excluded the very smallest of these classes and considered only classes with 10 to 24 students, found that 89% of those classes had either one or zero African–American students, 41% had one or zero Asian–American students, and 37% had either one or zero Hispanic students.[63] In its second study, UT surveyed undergraduates on their impressions of diversity on campus and in the classroom. Minority students reported feeling isolated, and a majority of all students felt there was "insufficient minority representation" in classrooms for "the full benefits of diversity to occur."[64]

The University incorporated the findings of these two studies in its June 2004 *Proposal to Consider Race and Ethnicity in Admissions*.[65] The *2004 Proposal* concluded that diverse student enrollment "break[s] down stereotypes," "promotes cross-racial understanding," and "prepares students for an increasingly diverse workplace and society."[66] With respect to the undergraduate program in particular, the *2004 Proposal* explained that "[a] comprehensive college education requires a

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minority student is apt to feel isolated or like a spokesperson for his or her race. *Id.* at 602–03; *see also Grutter*, 539 U.S. at 319, 123 S.Ct. 2325.

63. Lavergne Aff. (Dist. Ct. Dkt. No. 102, Tab B) ¶¶ 4–5.

64. Walker Aff. (Dist. Ct. Dkt. No. 96, Tab 11) ¶ 12.

65. Dist. Ct. Dkt. No. 96, Tab 11, Ex. A [hereinafter *2004 Proposal*].

66. *Id.* at 1 (internal quotation marks omitted); *see also Fisher*, 645 F.Supp.2d at 603.

robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders."[67] With one eye on *Grutter*, it observed that these objectives are especially important at UT because its "mission and ... flagship role" is to "prepare its students to be the leaders of the State of Texas"—a role which, given the state's increasingly diverse profile, will require them "to be able to lead a multicultural workforce and to communicate policy to a diverse electorate."[68]

Citing the classroom diversity study, the *2004 Proposal* explained that UT had not yet achieved the critical mass of underrepresented minority students needed to obtain the full educational benefits of diversity. Accordingly, the *2004 Proposal* recommended adding the consideration of race as one additional factor within a larger admissions scoring index. This recommendation was presented as "an acknowledgment that the significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population prevent the University from fully achieving its mission."[69]

After more than a year of study following the *Grutter* decision, UT adopted a policy to include race as one of many factors considered in admissions. UT has no set

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67. *2004 Proposal* at 23 (quoted in *Fisher*, 645 F.Supp.2d at 602).

68. *Id.* at 24 (quoted in *Fisher*, 645 F.Supp.2d at 602).

69. *Id.* (quoted in *Fisher*, 645 F.Supp.2d at 602).

date by which it will end the use of race in undergraduate admissions. Rather, it formally reviews the need for race-conscious measures every five years and considers whether adequate race-neutral alternatives exist. In addition, the district court found that the University informally reviews its admissions procedures each year.[70]

The current policy has produced noticeable results. One magazine dedicated to diversity in higher education ranked UT "sixth in the nation in producing undergraduate degrees for minority groups."[71] In an entering class that was roughly the same size in 1998 as it was in 2008, the enrollment of African–American students doubled from 165 students to 335 students. Hispanic enrollment increased approximately 1.5 times, from 762 students to 1,228 students. Asian–American enrollment also increased nearly 10%, from 1,034 students to 1,126 students.[72] By contrast, in 2004, the last year the Top Ten Percent Law operated without the *Grutter* plan, fall enrollment included only 275 African–Americans and 1,024 Hispanics.

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70. *Fisher*, 645 F.Supp.2d at 594.

71. *Id.* This particular ranking is somewhat limited in its significance, however, as the results are based on raw tabulations of the number of degrees conferred upon minority students. Large schools, like UT, are more likely to be ranked higher simply because they graduate a greater number of students (both minorities and non-minorities). *See* Victor M.H. Borden, *Top 100 Undergraduate Degree Producers: Interpreting the Data*, DIVERSE ISSUES IN HIGHER EDUC., June 12, 2008.

72. *Statistical Handbook 2004–2005*, at 22 tbl.S13A; *Statistical Handbook 2009–2010*, at 16 tbl.S12 (data for fall enrollment only). For fall and summer numbers combined, see *2008 Top Ten Percent Report* at 6.

Appendix E

Because of the myriad programs instituted, it can be difficult to attribute increases in minority enrollment to any one initiative. In addition, demographics have shifted in Texas, so increases in minority enrollment likely in part reflect the increased presence of minorities statewide.

III. THE CHALLENGED POLICY

UT's consideration of race is one part of the complex admissions process operating when Appellants were rejected. Given Appellants' challenge, we must examine the whole of the process.

A

UT is a public institution of higher education, authorized by the Texas Constitution and supported by state and federal funding. Accordingly, it begins its admissions process by dividing applicants into three pools: (1) Texas residents, (2) domestic non-Texas residents, and (3) international students. Students compete for admission only against other students in their respective pool. Texas residents are allotted 90% of all available seats, with admission based on a two-tiered system, beginning with students automatically admitted under the Top Ten Percent Law and then filling the remaining seats on the basis of the Academic and Personal Achievement Indices.[73] Because Appellants are Texas residents, their challenge focuses on the admissions procedures applied to in-state applicants.

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73. Admission decisions for domestic non-Texas residents and international applicants are made solely on the basis of their Academic and Personal Achievement Indices.

Appendix E

Texas applicants are divided into two subgroups: (1) Texas residents who are in the top ten percent of their high school class and (2) those Texas residents who are not. Top ten percent applicants are guaranteed admission to the University, and the vast majority of freshmen are selected in this way, without a confessed consideration of race. In 2008, for example, 81% of the entering class was admitted under the Top Ten Percent Law, filling 88% of the seats allotted to Texas residents and leaving only 1,216 offers of admission university-wide for non-top ten percent residents.[74] The impact of the Top Ten Percent Law on UT's admissions has increased dramatically since it was first introduced in 1998, when only 41% of the seats for Texas residents were claimed by students with guaranteed admission.[75]

The remaining Texas applicants, who were not within the top ten percent of their high school graduating class, compete for admission based on their Academic and Personal Achievement Indices.[76] The Academic Index

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74. *2008 Top Ten Percent Report* at 8 tbl.2, 9 tbl.2b. Table 2 shows 8,984 top ten percent students were admitted in 2008. The UT Associate Director of Admissions reported that 10,200 admissions slots are available for Texas residents, leaving 1,216 slots for non-top ten percent students. Ishop Aff. (Dist. Ct. Dkt. No. 96, Tab 7) ¶ 12.

75. *Id.* at 7 tbl.1a. In 1998, out of a class that included 6,110 Texas residents, only 2,513 enrolled freshmen were admitted under the Top Ten Percent Law.

76. The district court found that, on "relatively rare" occasions, a holistic review of the entire application may result in

is the mechanical formula that predicts freshman GPA using standardized test scores and high school class rank.[77] Some applicants' AI scores are high enough that they receive admission based on that score alone. Others are low enough that their applications are considered presumptively denied. If an application is presumptively denied, senior admission staff review the file and may, on rare occasions, designate the file for full review notwithstanding the AI score.[78]

The Personal Achievement Index is based on three scores: one score for each of the two required essays and a third score, called the personal achievement score, which represents an evaluation of the applicant's entire file. The essays are each given a score between 1 and 6 through "a holistic evaluation of the essay as a piece of writing based on its complexity of thought, substantiality of development,

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the University admitting an applicant to the fall class even though his or her AI or PAI scores fall just shy of the official cutoff. *See Fisher*, 645 F.Supp.2d at 599.

77. *Fisher*, 645 F.Supp.2d at 596. The precise formulas used to calculate an applicant's Academic Index are derived by regression analysis and vary by intended major. For instance, the formula for prospective engineering majors gives greater weight to math scores, whereas the formula for prospective liberal arts majors gives somewhat greater weight to verbal scores. *See 2004 Proposal* at 27 & n.5. The differences in these formulas are immaterial to the present case.

78. In other words, no applicant is denied admission based purely on AI score without having her file reviewed by at least one admissions reader and her individual circumstances considered.

and facility with language."[79] The personal achievement score is also based on a scale of 1 to 6, although it is given slightly greater weight in the final PAI calculation than the mean of the two essay scores.[80]

This personal achievement score is designed to recognize qualified students whose merit as applicants was not adequately reflected by their Academic Index. Admissions staff assign the score by assessing an applicant's demonstrated leadership qualities, awards and honors, work experience, and involvement in extracurricular activities and community service. In addition, the personal achievement score includes a "special circumstances" element that may reflect the socioeconomic status of the applicant and his or her high school, the applicant's family status and family responsibilities, the applicant's standardized test score compared to the average of her high school, and—beginning in 2004—the applicant's race.[81] To assess these intangible factors, evaluators read the applicant's essays again, but this time with an eye to the information conveyed rather than the quality of the student's writing. Admissions officers undergo annual training by a nationally recognized expert in holistic scoring, and senior staff members perform quality control to verify that awarded scores are appropriate and consistent. The most recent study, in 2005, found that

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79. *Fisher*, 645 F.Supp.2d at 597.

80. PAI = [(personal achievement score * 4) + (average essay score * 3)] / 7. *Id.* at 597 n. 7.

81. *Id.* at 591–92, 597.

holistic file readers scored within one point of each other 88% of the time.[82]

None of the elements of the personal achievement score—including race—are considered individually or given separate numerical values to be added together. Rather, the file is evaluated as a whole in order to provide the fullest possible understanding of the student as a person and to place his or her achievements in context.[83] As UT's director of admissions explained, "race provides—like [the] language [spoken in the applicant's home], whether or not someone is the first in their family to attend college, and family responsibilities—important context in which to evaluate applicants, and is only one aspect of the diversity that the University seeks to attain."[84] Race is considered as part of the applicant's context whether or not the applicant belongs to a minority group, and so—at least in theory—it "can positively impact applicants of all races, including Caucasian[s], or [it] may have no impact whatsoever."[85] Moreover, given the mechanics of UT's admissions process, race has the potential to influence only a small part of the applicant's overall admissions score. The sole instance when race is

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82. *Id.* at 597; *see* Univ. of Tex. at Austin Office of Admissions, *Inter-Rater Reliability of Holistic Measures Used in the Freshman Admission Process of the University of Texas at Austin* (Feb. 22, 2005) (Dist.Ct.Dkt. No. 94, Ex. 10).

83. *Fisher*, 645 F.Supp.2d at 597.

84. Walker Aff. (Dist. Ct. Dkt. No. 96, Tab 11) ¶ 15.

85. *Fisher*, 645 F.Supp.2d at 597.

considered is as one element of the personal achievement score, which itself is only a part of the total PAI. Without a sufficiently high AI and well-written essays, an applicant with even the highest personal achievement score will still be denied admission.[86]

B

Although the process for calculating AI and PAI scores is common to all parts of the University, each offer of admission to UT is ultimately tied to an individual school or major. Texas residents in the top ten percent of their high school class are guaranteed admission to the University, but they are not assured admission to the individual school or program of their choice.

Most majors and colleges in the University provide automatic admission to Top Ten Percent Law applicants, but certain "impacted majors"—including the School of Business, the College of Communication, and the Schools of Engineering, Kinesiology, and Nursing—are obligated to accept only a certain number of Top Ten Percent Law applicants.[87] These programs are "impacted" because they could fill 80% or more of their available spaces each year solely through operation of the Top Ten Percent Law. To avoid oversubscription and to allow these colleges and

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86. *See id.* at 608.

87. In addition, because of special portfolio, audition, and other requirements, the Top Ten Percent Law does not apply to the School of Architecture, the School of Fine Arts, and certain honors programs.

majors to admit some non-top ten percent applicants, UT caps the percentage of students automatically admitted to these programs at 75% of the available spaces.[88]

Top Ten Percent Law applicants who do not receive automatic entry to their first choice program compete for admission to the remaining spaces, and if necessary to their second-choice program, on the basis of their AI and PAI scores. The admissions office places students into matrices for each preferred school or major, with students grouped by AI score along one axis and PAI score along the other axis. Liaisons for the majors then establish a cutoff line, which is drawn in a stair-step pattern. Applicants denied admission to their first-choice program are considered for their second choice, with cutoff lines readjusted to reflect the influx of those applicants. Any top ten percent applicants not admitted to either their first– or second-choice program are automatically admitted as Liberal Arts Undeclared majors. All other applicants not yet admitted to UT compete, again according to AI and PAI scores, for any remaining seats in the Liberal Arts Undeclared program.

Although this completes the admissions process for the fall portion of the freshman class, no Texas resident who submits a timely application is denied admission. Instead, those residents not admitted to the entering fall class are offered admission to either the summer program

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88. Thus, for example, the School of Business granted automatic admission only to those students who graduated in the top 4% of their high school class and selected a business major as their first choice. Ishop Dep. (Dist. Ct. Dkt. No. 96, Tab 2) at 32.

or the Coordinated Admissions Program (CAP). Marginal applicants who missed the cutoff for the fall class are offered admission to the summer program, which permits students to begin their studies at UT during the summer and then join the regularly admitted students in the fall. About 800 students enroll in the summer program each year. All remaining Texas applicants are automatically enrolled in CAP, which guarantees admission as a transfer student if the student enrolls in another UT system campus for her freshman year and meets certain other conditions, including the completion of thirty credit hours with a cumulative grade point average of 3.2 or higher.

C

The Academic Index and Personal Achievement Index now employed by UT have been in continuous use since 1997. The lone substantive change came in 2005, following the *Grutter* decision, when the Board of Regents authorized the consideration of race as another "special circumstance" in assessing an applicant's personal achievement score.

Race—like all other elements of UT's holistic review—is not considered alone. Admissions officers reviewing each application are aware of the applicant's race, but UT does not monitor the aggregate racial composition of the admitted applicant pool during the process. The admissions decision for any particular applicant is not affected—positively or negatively—by the number of other students in her racial group who have been admitted

during that year.[89] Thus, "it is difficult to evaluate which applicants have been positively or negatively affected by its consideration or which applicants were ultimately offered admission due to their race who would not have otherwise been offered admission."[90] Nevertheless, the district court found that race "is undisputedly a meaningful factor that can make a difference in the evaluation of a student's application."[91]

D

UT undoubtedly has a compelling interest in obtaining the educational benefits of diversity, and its reasons for implementing race-conscious admissions—expressed in the *2004 Proposal*—mirror those approved by the Supreme Court in *Grutter*. The district court found that both the UT and *Grutter* policies "attempt to promote 'cross-racial understanding,' 'break down racial stereotypes,' enable students to better understand persons of other races, better prepare students to function in a multi-cultural workforce, cultivate the next set of national leaders, and prevent minority students from serving as 'spokespersons' for their race."[92] Like the law school in *Grutter*, UT

89. *Fisher*, 645 F.Supp.2d at 598, 609.

90. *Id.* at 597.

91. *Id.* at 597–98.

92. *Id.* at 603 (quoting *Grutter*, 539 U.S. at 319–20, 123 S.Ct. 2325). More specifically, as described in the *2004 Proposal*, one purpose of UT's race-conscious policy is " 'to provide an educational setting that fosters cross-racial understanding,

"has determined, based on its experience and expertise, that a 'critical mass' of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body."[93] UT has made an "educational judgment that such diversity is essential to its educational mission," just as Michigan's Law School did in *Grutter*.[94]

Considering UT's admissions system in its historical context, it is evident that the efforts of the University have been studied, serious, and of high purpose, lending support to a constitutionally protected zone of discretion. That said, the use of race summons close judicial scrutiny, necessary for the nation's slow march toward the ideal

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provides enlightened discussion and learning, and prepares students to function in an increasingly diverse workforce and society.'" *2004 Proposal* at 25 (quoted in *Fisher*, 645 F.Supp.2d at 603). Another is to produce " 'future educational, cultural, business, and sociopolitical leaders.'" *Id.* at 24 (quoted in *Fisher*, 645 F.Supp.2d at 602). And because Texas's population is uniquely diverse—"[i]n the near future, Texas will have no majority race"—" 'tomorrow's leaders must not only be drawn from a diverse population[,] but must also be able to lead a multicultural workforce and to communicate policy to a diverse electorate.'" *Id.* at 24 (quoted in *Fisher*, 645 F.Supp.2d at 602). As the state's flagship public institution, UT determined that it " 'has a compelling educational interest to produce graduates who are capable of fulfilling the future leadership needs of Texas.' " *Id.* at 24 (quoted in *Fisher*, 645 F.Supp.2d at 602).

93. *Fisher*, 645 F.Supp.2d at 603 (quoting *Grutter*, 539 U.S. at 333, 123 S.Ct. 2325).

94. *Grutter*, 539 U.S. at 328, 123 S.Ct. 2325.

of a color-blind society, at least as far as the government can see.

IV. STANDARD OF REVIEW

It is a given that as UT's *Grutter*-like admissions program differentiates between applicants on the basis of race, it is subject to strict scrutiny with its requirement of narrow tailoring.[95] At the same time, the Supreme Court has held that "[c]ontext matters" when evaluating race-based governmental action, and a university's educational judgment in developing diversity policies is due deference.[96]

A

Judicial deference to a university's academic decisions rests on two independent foundations. First, these decisions are a product of "complex educational judgments in an area that lies primarily within the expertise of the university," far outside the experience of the courts.[97] Second, "universities occupy a special niche

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95. *Id.* at 326, 328, 123 S.Ct. 2325 (citing *Adarand*, 515 U.S. at 227, 115 S.Ct. 2097); *see also Parents Involved*, 551 U.S. at 720, 127 S.Ct. 2738.

96. *Grutter*, 539 U.S. at 327, 123 S.Ct. 2325; *see also id.* at 328, 123 S.Ct. 2325 ("The Law School's educational judgment ... is one to which we defer .... Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.").

97. *Id.* at 328, 123 S.Ct. 2325.

in our constitutional tradition," with educational autonomy grounded in the First Amendment.[98] As Justice Powell explained in *Bakke*, "[a]cademic freedom .... includes [a university's] selection of its student body."[99]

Yet the scrutiny triggered by racial classification "is no less strict for taking into account" the special circumstances of higher education.[100] "[S]trict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in [a] particular context."[101] Narrow tailoring, a component of strict scrutiny, requires any use of racial classifications to so closely fit a compelling goal as to remove the possibility that the motive for the classification was illegitimate racial stereotype. Rather than second-guess the merits of the University's decision, a task we are ill-equipped to perform, we instead scrutinize the University's decisionmaking process to ensure that its decision to adopt a race-conscious admissions policy followed from the good faith consideration *Grutter* requires. We presume the University acted in good faith, a presumption Appellants are free to rebut.[102] Relatedly, while we focus

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98. *Id.* at 329, 123 S.Ct. 2325.

99. *Bakke*, 438 U.S. at 312, 98 S.Ct. 2733 (opinion of Powell, J.).

100. *Grutter*, 539 U.S. at 328, 123 S.Ct. 2325.

101. *Id.* at 327, 123 S.Ct. 2325.

102. *Id.* at 329, 123 S.Ct. 2325 ("[G]ood faith on the part of a university is presumed absent a showing to the contrary." (internal

on the University's decision to adopt a *Grutter*-like plan, admissions outcomes remain relevant evidence of the plan's necessity—a reality check.

B

With a nod to *Grutter*'s command that we generally give a degree of deference to a university's educational judgments, Appellants urge that *Grutter* did not extend such deference to a university's decision to implement a race-conscious admissions policy. Instead, they maintain *Grutter* deferred only to the university's judgment that diversity would have educational benefits, not to the assessment of whether the university has attained critical mass of a racial group or whether race-conscious efforts are necessary to achieve that end.

As an initial matter, this argument in its full flower is contradicted by *Grutter*. The majority held that, like the examination into whether the University has a compelling interest, "the narrow-tailoring inquiry ... must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education."[103] That is, the narrow-tailoring inquiry—like the compelling-interest inquiry—is undertaken with a degree of deference to the University's constitutionally protected, presumably expert academic judgment.

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quotation marks omitted) (quoting *Bakke*, 438 U.S. at 318–19, 98 S.Ct. 2733 (opinion of Powell, J.))).

103. *Id.* at 333–34.

Appendix E

Appellants would have us borrow a more restrictive standard of review from a series of public employment and government contracting cases, in which the Supreme Court "held that certain government actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional only where there is a 'strong basis in evidence' that the remedial actions were necessary."[104] The Court most recently applied this strong-basis-in-evidence standard in *Ricci v. DeStefano.*

In *Ricci,* white firefighters from New Haven, Connecticut sued under Title VII, challenging the city's decision to disregard a promotions test after the results showed that white candidates significantly outperformed minority candidates.[105] New Haven defended this action, arguing that if it had ratified the test results it could have faced liability under Title VII for adopting a practice that had a disparate impact on the minority firefighters.[106] The white firefighters, however, argued that ignoring the test results was a violation of Title VII's separate prohibition against intentional race discrimination, or disparate

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104. *Ricci v. DeStefano,* ––– U.S. ––––, 129 S.Ct. 2658, 2675, 174 L.Ed.2d 490 (2009) (some internal quotation marks omitted) (quoting *Richmond v. J.A Croson Co.,* 488 U.S. 469, 500, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), in turn quoting *Wygant v. Jackson Bd. of Educ.,* 476 U.S. 267, 277, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality)).

105. *Id.* at 2664.

106. *Id.*; *see* 42 U.S.C. § 2000e–2(k)(1)(A)(i) (codifying *Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)).

treatment.[107] Responding to this tension, the Supreme Court held that such intentional race-based action is not permitted by Title VII unless the employer can demonstrate with a strong basis in evidence that it would have been liable under the disparate impact provision had it not taken the action.[108] The Court suggested that anything less would risk creating a *de facto* quota system, where an employer could disregard test results to achieve a preferred racial balance, impermissibly shifting the focus from individual discrimination to group bias.[109] Applying the strong-basis-in-evidence standard, the Supreme Court held that New Haven's fear of disparate impact liability was not adequately supported.[110]

The city had argued it only needed to show a fear of liability based on a good-faith belief—a rough analogy to the university admissions standard. Yet the Court found that an intent-based standard could not be squared with the statutory text. The *Ricci* Court turned to the strong-basis-in-evidence standard "as a matter of statutory construction to resolve any conflict between the disparate-treatment and disparate-impact provisions of Title VII."[111]

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107. *See* 42 U.S.C. § 2000e–2(a)(1).

108. *Ricci*, 129 S.Ct. at 2664.

109. *Id.* at 2676.

110. *Id.*

111. *Id.* at 2676. We note that these statutory constraints are not present in the context of university admissions programs.

Appendix E

Although *Ricci* did not address the firefighters' equal protection claim, the Court derived its standard from *Richmond v. J.A. Croson Co.*,[112] a government contracting case, which in turn adopted from a plurality opinion in *Wygant v. Jackson Board of Education*, a public employment case.[113] In *Wygant*, the plurality concluded that defending race-based public employment decisions as responsive to present effects of past discrimination required a strong basis in evidence of the past discrimination.[114] Similarly, *Croson* adopted this standard after observing that "an amorphous claim [of] past discrimination in a particular industry cannot justify the use of an unyielding racial quota."[115]

This recitation of history, quick as it is, makes plain that the cases Appellants cite have little purchase in this challenge to university admissions. The high standard for justifying the use of race in public employment decisions responds to the reality that race used in a backward-looking attempt to remedy past wrongs, without focus on individual victims, does not treat race as part of a holistic consideration. In doing so, it touches the third rail of racial quotas. *Wygant* and *Croson* both involved explicit quotas; in *Ricci*, the Court was concerned that the city's use of race threatened to devolve into a *de facto* quota.

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112. 488 U.S. at 500, 109 S.Ct. 706.

113. 476 U.S. at 277, 106 S.Ct. 1842.

114. *Id.* at 277–78, 106 S.Ct. 1842.

115. *Croson*, 488 U.S. at 499, 109 S.Ct. 706.

By contrast, *Grutter* recognized that universities are engaged in a different enterprise. Their holistic approach is part of a forward-looking effort to obtain the educational benefits of diversity. The look to race as but one element of this further goal, coupled with individualized consideration, steers university admissions away from a quota system. *Grutter* teaches that so long as a university considers race in a holistic and individualized manner, and not as part of a quota or fixed-point system, courts must afford a measure of deference to the university's good faith determination that certain race-conscious measures are necessary to achieve the educational benefits of diversity, including attaining critical mass in minority enrollment.

Parents Involved in Community Schools v. Seattle School District No. 1 further supports this understanding.[116] When scrutinizing two school districts' race-conscious busing plans, the Court invoked *Grutter*'s "serious, good faith consideration" standard, rather than the strong-basis-in-evidence standard that Appellants would have us apply.[117] The *Parents Involved* Court never suggested that the school districts would be required to prove their plans were meticulously supported by some particular quantum of specific evidence. Rather, the Court struck down the school districts' programs because they pursued racial balancing and defined students based on racial group classifications, not on individual circumstances.

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116. 551 U.S. 701, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007).

117. *See id.* at 735, 127 S.Ct. 2738 (quoting *Grutter*, 539 U.S. at 339, 123 S.Ct. 2325).

In short, the Court has not retreated from *Grutter*'s mode of analysis, one tailored to holistic university admissions programs. Thus, we apply strict scrutiny to race-conscious admissions policies in higher education, mindful of a university's academic freedom and the complex educational judgments made when assembling a broadly diverse student body.

C

Appellants do not allege that UT's race-conscious admissions policy is functionally different from, or gives greater consideration to race than, the policy upheld in *Grutter*. Rather, Appellants question whether UT *needs* a *Grutter*-like policy. As their argument goes, the University's race-conscious admissions program is unwarranted because (1) UT has gone beyond a mere interest in diversity for education's sake and instead pursues a racial composition that mirrors that of the state of Texas as a whole, amounting to an unconstitutional attempt to achieve "racial balancing"; (2) the University has not given adequate consideration to available "race-neutral" alternatives, particularly percentage plans like the Top Ten Percent Law; and (3) UT's minority enrollment under the Top Ten Percent Law already surpassed critical mass, such that the additional (and allegedly "minimal") increase in diversity achieved through UT's *Grutter*-like policy does not justify its use of race-conscious measures. We will consider each of these arguments in turn.

Appendix E

V. RACIAL BALANCING

Again, diversity is a permissible goal for educational institutions, but "outright racial balancing" is not. Attempting to ensure that the student body contains some specified percentage of a particular racial group is "patently unconstitutional."[118] This concept follows from the Supreme Court's repeated emphasis that, by itself, increasing racial representation is not a sufficiently compelling interest to justify the use of racial preferences. *Grutter* described many important educational interests that may be sought through diversity, but steadfastly maintained that " '[r]acial balance is not to be to be achieved for its own sake.'"[119] Moreover, "[t]he point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance" by creating an unconstitutional quota.[120]

A

Looking to the details of UT's race-conscious admissions policy, it is clear that administrators knew a quota system would not survive judicial review, and they took care to avoid this fatal mistake. UT's system was

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118. *Grutter*, 539 U.S. at 329–30, 123 S.Ct. 2325 (quoting *Bakke*, 438 U.S. at 308, 98 S.Ct. 2733 (opinion of Powell, J.)).

119. *Id.* at 330, 123 S.Ct. 2325 (quoting *Freeman v. Pitts*, 503 U.S. 467, 494, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992)).

120. *Parents Involved*, 551 U.S. at 723, 127 S.Ct. 2738.

modeled after the *Grutter* program, which the Supreme Court held was not a quota. UT has never established a specific number, percentage, or range of minority enrollment that would constitute "critical mass," nor does it award any fixed number of points to minority students in a way that impermissibly values race for its own sake.[121]

Further, there is no indication that UT's *Grutter*-like plan is a quota by another name. It is true that UT looks in part to the number of minority students when evaluating whether it has yet achieved a critical mass, but "[s]ome attention to numbers, without more, does not transform

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121. Appellants argue that UT's "head-in-the-sand approach"—refusing to identify any specific number, percentage, or range of minority students that would constitute critical mass—is an improper attempt "to short circuit any inquiry into whether it can justify its policy with evidence by arguing that critical mass is a purely subjective concept that cannot be evaluated in numerical terms." Appellants claim that until UT identifies some "finishing line," the use of race has "no logical stopping point" and is therefore "too amorphous a basis for imposing a racially classified remedy." But in both *Bakke* and *Grutter*, the controlling opinions expressly approved of policies seeking only some undefined "meaningful number" of minorities, *see Grutter*, 539 U.S. at 335, 123 S.Ct. 2325; *Bakke*, 438 U.S. at 323, 98 S.Ct. 2733 (opinion of Powell, J.), and the Court has firmly "rejected" the argument "that diversity as a basis for employing racial preferences is simply too open-ended, ill-defined, and indefinite" a ground for race-conscious university admissions policies, *Gratz*, 539 U.S. at 268, 123 S.Ct. 2411 (internal quotation marks omitted). On the contrary, if UT were to identify some numerical target for minority enrollment, that would likely render the policy unconstitutional under *Grutter*.

a flexible admissions system into a rigid quota."[122] Whereas a quota imposes a fixed percentage standard that cannot be deviated from, a permissible diversity goal " 'require[s] only a good-faith effort ... to come within a range demarcated by the goal itself.'"[123] Indeed, UT's policy improves upon the program approved in *Grutter* because the University does not keep an ongoing tally of the racial composition of the entering class during its admissions process.[124]

UT has not admitted students so that its undergraduate population directly mirrors the demographics of Texas. Its methods and efforts belie the charge. The percentage of Hispanics at UT is less than two-thirds the percentage of Hispanics in Texas, and the percentage of African–Americans at UT is half the percentage of Texas's African–American population, while Asian–American enrollment is more than five times the percentage of Texan Asian–Americans.[125]

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122. *Grutter*, 539 U.S. at 336, 123 S.Ct. 2325 (citation, internal quotation marks, and brackets omitted).

123. *Id.* at 335, 123 S.Ct. 2325 (quoting *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 495, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986)).

124. *Cf. Grutter*, 539 U.S. at 391–92, 123 S.Ct. 2325 (Kennedy, J., dissenting).

125. *Fisher*, 645 F.Supp.2d at 607 n. 11.

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B

Appellants nevertheless argue that UT's program amounts to racial balancing because it supposedly evinces a special concern for demographically underrepresented groups, while neglecting the diverse contributions of others. These arguments do not account for the operation of UT's admissions system or the scope of the diversity interest approved by the Court in *Grutter.*

1

The district court expressly found that race can enhance the personal achievement score of a student from any racial background, including whites and Asian–Americans.[126] For example, a white student who has demonstrated substantial community involvement at a predominantly Hispanic high school may contribute a unique perspective that produces a greater personal achievement score than a similarly situated Hispanic student from the same school. This possibility is the point of *Grutter*'s holistic and individualized assessments, which must be "'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.'"[127] Indeed, just as in *Grutter,* UT applicants of every race may submit supplemental information to highlight their potential diversity contributions, which

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126. *Id.* at 606.

127. *Grutter,* 539 U.S. at 337, 123 S.Ct. 2325 (quoting *Bakke,* 438 U.S. at 317, 98 S.Ct. 2733 (opinion of Powell, J.)).

allows students who are diverse in unconventional ways to describe their unique attributes.[128]

The summary judgment record shows that demographics are not consulted as part of any individual admissions decision, and UT's admissions procedures do not treat certain racial groups or minorities differently than others when reviewing individual applications. Rather, the act of considering minority group demographics (to which Appellants object) took place only when the University first studied whether a race-conscious admissions program was needed to attain critical mass. Appellants' objection therefore must be directed not to the design of the program, but rather to whether UT's decision to reintroduce race as a factor in admissions was made in good faith.

2

Appellants contend that UT revealed its true motive to be outright racial balancing when it referenced state population data to justify the adoption of race-conscious admissions measures. They insist that if UT were truly focused on educational benefits and critical mass, then there should be no reason to consult demographic data when determining whether UT had sufficient minority representation.

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128. *Id.* at 338, 123 S.Ct. 2325; *see Fisher,* 645 F.Supp.2d at 597.

We disagree. The University's policies and measured attention to the community it serves are consonant with the educational goals outlined in *Grutter* and do not support a finding that the University was engaged in improper racial balancing during our time frame of review. Both *Grutter* and *Bakke* recognized that "there is of course 'some relationship between numbers and achieving the benefits to be derived from a diverse student body.'"[129] In its policymaking process, UT gave appropriate attention to those educational benefits identified in *Grutter* without overstepping any constitutional bounds.

Grutter recognized that racial and ethnic backgrounds play an influential role in producing the diversity of views and perspectives which are paramount to a university's educational mission. As Justice O'Connor explained, the "unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters" can have a significant impact on a student's views.[130] The Court acknowledged that "[b]y virtue of our Nation's struggle with racial inequality, [underrepresented minority students] are both likely to have experiences with particular importance to the [University's] mission, and less likely to be admitted in meaningful numbers on criteria that ignore these experiences."[131] UT properly

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129. *Grutter*, 539 U.S. at 336, 123 S.Ct. 2325 (quoting *Bakke*, 438 U.S. at 323, 98 S.Ct. 2733 (opinion of Powell, J.)).

130. *Id.* at 333, 123 S.Ct. 2325.

131. *Id.* at 338, 123 S.Ct. 2325.

concluded that these individuals from the state's underrepresented minorities would be most likely to add unique perspectives that are otherwise absent from its classrooms. Identifying *which* backgrounds are underrepresented, in turn, presupposes some reference to demographics, and it was therefore appropriate for UT to give limited attention to this data when considering whether its current student body included a critical mass of underrepresented groups.

Preparing students to function as professionals in an increasingly diverse workforce likewise calls for some consideration of a university's particular educational mission and the community it serves. For instance, a nationally renowned law school draws upon a nationwide applicant pool and sends its graduates into careers in all states; therefore it is appropriate for such a school to consider national diversity levels when setting goals for its admissions program. In contrast, UT's stated goal is to "produce graduates who are capable of fulfilling the future leadership needs of Texas."[132] This objective calls for a more tailored diversity emphasis. In a state as racially diverse as Texas, ensuring that graduates learn to collaborate with members of racial groups they will encounter in the workforce is especially important. The *2004 Proposal* concluded that a race-conscious admissions program was necessary at UT specifically because "from a racial, ethnic, and cultural standpoint, students at the

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132. *2004 Proposal* at 23 (quoted in *Fisher*, 645 F.Supp.2d at 602).

University [were] being educated in a less-than-realistic environment that [was] not conducive to training the leaders of tomorrow."[133]

The need for a state's leading educational institution to foster civic engagement and maintain visibly open paths to leadership also requires a degree of attention to the surrounding community. A university presenting itself as open to all may be challenged when the state's minority population grows steadily but minority enrollment does not. Indeed, the *2004 Proposal* expressed concern that UT appeared "largely closed to nonwhite applicants" and did not "provide a welcoming supportive environment" for minority students.[134] UT was keenly aware that by sending a message that people of all stripes can succeed at UT, the University would attract promising applicants from once-insulated communities, over time narrowing the credentials gap between minority and non-minority applicants.[135] After *Hopwood*, such applicants were dissuaded from applying to UT. But through the Top Ten Percent Law and *Grutter*-like plan, UT has increased its minority applicant pool in its effort to ensure that it serves as a flagship university for the entire state, not just Texans

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133. *Id.* at 24–25 (quoted in *Fisher*, 645 F.Supp.2d at 602).

134. *Id.* at 14.

135. *See, e.g.*, Mark C. Long et al., *Policy Transparency and College Enrollment: Did the Texas Top Ten Percent Law Broaden Access to the Public Flagships?*, 627 ANNALS AM. ACAD. POL. & SOC. SCI. 82 (2010); Kim M. Lloyd et al., *Minority College Aspirations, Expectations and Applications Under the Texas Top 10% Law*, 86 SOC. FORCES 1105 (2008).

of certain backgrounds. Cultivating paths to leadership for underrepresented groups serves both the individual and the public, sustaining an infrastructure of leaders in an increasingly pluralistic society. Although a university must eschew demographic targets, it need not be blind to significant racial disparities in its community, nor is it wholly prohibited from taking the degree of disparity into account.

Finally, *Grutter*'s structure accepts that a university's twin objectives of rewarding academic merit and fostering diversity can be complementary rather than competing goals; that students rising to the top of underrepresented groups demonstrate promise as future leaders. These students' relative success in the face of harmful and widespread stereotypes evidences a degree of drive, determination, and merit not captured by test scores alone. Insofar as Appellants complain that the University's limited attention to demographics was inconsistent with the legitimate educational concerns recognized in *Bakke* and *Grutter*, we conclude that their contention cannot be sustained.

3

Appellants argue that a broad approach to educational diversity is improper because "critical mass" must be an "inward-facing concept ... that focuses on the functioning of the student body," encompassing only that level of minority enrollment necessary to ensure that minority students participate in the classroom and do not feel isolated. While Appellants' view may comport with one

literal interpretation of the "critical mass" label, it is not the view that prevailed in *Grutter*. The *Grutter* majority defined critical mass "by reference to the educational benefits that diversity is designed to produce,"[136] and the educational benefits recognized in *Grutter* go beyond the narrow "pedagogical concept" urged by Appellants. On this understanding, there is no reason to assume that critical mass will or should be the same for every racial group or every university. We are persuaded, as was the district court, that the University adhered to *Grutter* when it reintroduced race into its admissions process based in part on an analysis that devoted special attention to those minorities which were most significantly underrepresented on its campus.

VI. THE TOP TEN PERCENT LAW

Grutter is best read as a path toward the moment when all race-conscious measures become unnecessary. To that end, *Grutter* requires universities that employ race-conscious admissions to seriously consider race-neutral alternatives. But "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative," especially if the proffered alternatives would require the University to sacrifice other important interests, like its academic selectivity and reputation for excellence.[137]

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136. *Grutter*, 539 U.S. at 339, 123 S.Ct. 2325.

137. *See id.* at 339–40, 123 S.Ct. 2325.

Appendix E

The parties devote significant attention to the Top Ten Percent Law.[138] Since the Law was first enacted in 1997, UT has seen increases in both African–American and Hispanic enrollment, but again, changing demographics and other minority outreach programs render it difficult to quantify the increases attributable to the Top Ten Percent Law.[139]

Appellants put forward the Top Ten Percent Law as a facially race-neutral alternative that would allow UT to obtain a critical mass of minority enrollment without resorting to race-conscious admissions. As the argument goes, if the Top Ten Percent Law were able to serve the University's interests "about as well" as race-conscious admissions, without differentiating between students on the basis of race, then it would render UT's current admissions program unconstitutional.[140] UT responds that the Top Ten Percent Law does not constitute a workable

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138. TEX. EDUC.CODE § 51.803 (1997). The precise impact UT's other race-neutral alternatives (such as scholarship and outreach programs) have had on minority enrollment is not clear, but their effect would not appear to be great enough to bear on the constitutionality of the University's race-conscious admissions policy.

139. *Fisher*, 645 F.Supp.2d at 594; *see also* Marta Tienda & Teresa A. Sullivan, *The Promise and Peril of the Texas Uniform Admissions Law* 164–65 & tbl.1, *in* THE NEXT TWENTY-FIVE YEARS? AFFIRMATIVE ACTION AND HIGHER EDUCATION IN THE UNITED STATES AND SOUTH AFRICA A 155 (David L. Featherman et al. eds., 2010).

140. *See Grutter*, 539 U.S. at 339, 123 S.Ct. 2325 (quoting *Wygant*, 476 U.S. at 280 n. 6, 106 S.Ct. 1842 (1986)).

alternative to a flexible admissions system, and so it is "entirely irrelevant" as a matter of law in determining whether or not a university may adopt the holistic consideration of race to achieve critical mass.

UT is correct that so-called "percentage plans" are not a constitutionally mandated replacement for race-conscious admissions programs under *Grutter*, although—as will become apparent—this realization alone does not end our constitutional inquiry. The idea of percentage plans as a viable alternative to race-conscious admissions policies was directly advocated to the *Grutter* Court by the United States, arguing as *amicus curiae*.[141] In response, the Court held that although percentage plans may be a race-neutral means of increasing minority enrollment, they are not a workable alternative—at least in a constitutionally significant sense—because "they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university."[142] In addition, the Court emphasized existing percentage plans—including UT's—are simply not "capable of producing a critical mass without forcing [universities] to abandon the academic selectivity that is the cornerstone of [their] educational mission."[143]

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141. The United States has since filed an amicus brief in the present case, urging us to uphold UT's current admissions program.

142. *Grutter*, 539 U.S. at 340, 123 S.Ct. 2325 (internal citation omitted).

143. *Id.*

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That the Top Ten Percent Law is not a constitutionally-mandated alternative does not make it irrelevant. By now it is clear that the Law is inescapably tied to UT's *Grutter* plan, as *Grutter* does its work with the applicants who remain after the cut of the Top Ten Percent Law. In 2008, top ten percent applicants accounted for 8,984 of the 10,200 Texas admittees.[144] Thus, with the Top Ten Percent Law in effect, UT's *Grutter* plan can only possibly influence the review of approximately 1,200 admitted students' applications.[145] In evaluating the constitutionality of an admissions program, we cannot ignore a part of the program comprising 88% of admissions offers for Texas residents and yielding 81% of enrolled Texan freshmen.[146]

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144. *2008 Top Ten Report* at 8 tbl.2; Ishop Aff. (Dist. Ct. Dkt. No. 96, Tab 7) ¶ 12.

145. In reality, the *Grutter* plan operates on even fewer applications, as many non-top ten percent students are admitted based purely on their class rank and standardized test scores, without any reference to their PAI, leaving only 841 seats in 2008 that were evaluated under the *Grutter* plan. *See* Ishop Aff. (Dist. Ct. Dkt. No. 96, Tab 7) ¶ 12.

146. *2008 Top Ten Report* at 7 tbl.1a; *see supra* note 74 and accompanying text. We also note that since it began, the Top Ten Percent Law has had an increasing impact on admissions decisions. In 1998, top ten percent candidates comprised just 41% of Texans in the freshman class. In 2004, 66% of Texan freshmen were top ten percent students, and in 2008, top ten percent students made up 81% of the Texas freshmen seats. While the legislative 75% cap on top ten percent enrollment may help alleviate some of the concerns with this plan, the fact remains that the Top Ten Percent Law operates today very differently than it did when first implemented.

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The reality is that the Top Ten Percent Law alone does not perform well in pursuit of the diversity *Grutter* endorsed and is in many ways at war with it. While the Law may have contributed to an increase in overall minority enrollment, those minority students remain clustered in certain programs, limiting the beneficial effects of educational diversity.[147] For example, nearly a quarter of the undergraduate students in UT's College of Social Work are Hispanic, and more than 10% are African–American. In the College of Education, 22.4% of students are Hispanic and 10.1% are African–American. By contrast, in the College of Business Administration, only 14.5% of the students are Hispanic and 3.4% are African–American.[148] It is evident that if UT is to have diverse interactions, it needs more minority students who are interested in and meet the requirements for a greater variety of colleges, not more students disproportionately enrolled in certain programs. The holistic review endorsed by *Grutter* gives UT that discretion, but the Top Ten Percent Law, which accounts for nearly 90% of all Texas

147. *See* Univ. of Tex. at Austin Office of Info. Mgmt., *Statistical Handbook 2009–2010*, at 32 tbl.S27 (2010) (reporting UT enrollment by college, grade level, ethnicity, and gender); Lisa Dickson, *Major Choices: Race and Gender Differences in College Major Choice*, 627 ANNALS AM. ACAD. POL. & SOC. SCI. 108, 108 (2010) (analyzing UT data and finding that "significant differences by gender, race, and ethnicity persist in initial college major choice even after controlling for the [SAT] score of the student and the high school class rank of the student").

148. *Statistical Handbook 2009–2010*, at 31–32 tbl.S27.

resident admissions, does not.[149]

Focusing narrowly on geographic diversity, in part as a proxy for race, the Top Ten Percent Law crowds out other types of diversity that would be considered under a *Grutter*-like plan. By ignoring these other diversity contributions, the Top Ten Percent Law restricts the University's ability to achieve the maximum educational benefits of a truly diverse student body.[150] As UT's 2003 classroom study shows, percentage plans bear little

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149. For example, instead of admitting a minority top ten percent student from a low-performing school, UT might admit a minority student with an interest in business who is just as academically qualified (and perhaps more so), but falls outside the top ten percent of his high school class because he attends a more competitive high school. This example also demonstrates how the Top Ten Percent Law hurts academic selectivity: UT must admit a top ten percent student from a low-performing high school before admitting a more qualified minority student who ranks just below the top ten percent at a highly competitive high school. This effect, in turn, further widens the "credentials gap" between minority and non-minority students at the University, which risks driving away matriculating minority students from difficult majors like business or the sciences.

150. The Top Ten Percent Law may produce diversity beyond varying hometowns, including differences in socioeconomic status and rural/urban/suburban upbringing. However, under the Top Ten Percent Law, the University does not have the opportunity to select for a wide range of diverse experiences (such as travel abroad, extra-curricular involvement, or work experience), so the Top Ten Percent Law bluntly operates as an attempt to create diversity through reliance on perceived group characteristics and segregated communities.

promise of producing the meaningful diverse interactions envisioned by *Grutter*, at least not in the classroom. For instance, the study reported that although overall enrollment of minority students at UT rose significantly between 1996 and 2002, the Fall 2002 schedule contained more classes with zero or one African American or Hispanic students than had the Fall 1996 schedule.[151]

Justice Ginsburg pointed out in *Grutter*'s companion case that percentage plans create damaging incentives to the education system. She observed that "[p]ercentage plans depend for their effectiveness on continued racial segregation at the secondary school level." These measures "encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages."[152] Similarly, these plans create a strong incentive to avoid competitive educational institutions like magnet schools.[153]

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151. *2004 Proposal* at 25 & tbl. 8.

152. *Gratz*, 539 U.S. at 304 n. 10, 123 S.Ct. 2411 (Ginsburg, J., dissenting).

153. In an effort to ameliorate this effect, a special provision of the Top Ten Percent Law provides that "a high school magnet program, academy, or other special program" may be considered "an independent high school with its own graduating class separate from the graduating class of other students attending the high school," effectively allowing the school to certify two separate groups of Top Ten Percent Law students. *See* TEX. EDUC.CODE § 51.8045.

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Texas applicants falling outside the top ten percent group face extreme competition to gain admittance to the University. There are approximately 16,000 students competing for only 1,216 fall admissions slots. The competition is so great that, on average, students admitted from outside the top ten percent of their high school class, regardless of race, have even higher SAT scores than those granted automatic admission under the Top Ten Percent Law.[154] Perversely, this system negatively impacts minority students (who nationally have lower standardized test scores) in the second decile of their classes at competitive high schools. *Grutter*'s holistic look at race may soften this unreasonable exclusion of those second-decile minorities better qualified than many of the non-minorities bluntly swept in under the Top Ten Percent Law. But not much. It requires no empirical study to observe that those excluded under this Law have been a rich source of Texas leaders over its history and that for some applicants, admission to the flagship school of Texas is little more possible than admission to Harvard.[155]

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154. *See 2008 Top Ten Percent Report* at 12 tbl.6 (showing the average SAT range for top ten percent and non-top ten percent students); *id.* at 13–15 tbls.6a–6d (displaying SAT ranges based on race and top ten percent status).

155. To reach its target class size, UT offers fall admission to 10,200 Texas applicants. Ishop Aff. (Dist. Ct. Dkt. No. 96, Tab 7) ¶ 12. For the class entering Fall 2008, after UT offered admission to top ten percent students, there were 1,216 admissions spots remaining. (The district court noted there were 841 places, but that number included the admission of so-called "Group A" applicants who have extremely high AI scores but are not in the top ten percent of their class. *See id.*) There were a total of

That all of these weaknesses are apparent in the Top Ten Percent Law only make its focus upon race the plainer.[156]

The Top Ten Percent Law was adopted to increase minority enrollment. That it has done, but its sweep of admissions is a polar opposite of the holistic focus upon individuals. Its internal proxies for race end-run

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27,712 applicants for the fall class of 2008. *Statistical Handbook 2009–2010*, at 25 tbl.S21. Neither the record nor any public information released by the University disclose what portion of that total applicant pool were Texas residents, but if we assume that proportion of applicants from Texas matches the 90% of admissions slots reserved for Texas applicants, one can estimate that there were 24,940 Texas applicants. Subtracting the 8,984 students admitted under the Top Ten Percent Law yields an estimate of 15,956 applicants for 1,216 seats, or an acceptance rate of approximately 7.6%. By comparison, the overall acceptance rate at Ivy League schools for the class entering Fall 2008 ranged from 8% (Harvard) to 21% (Cornell). *See The Rankings: Best National Universities*, U.S. NEWS & WORLD REP., Sept. 2009, at 84–85.

156. Appellants here do not challenge the constitutionality of the Top Ten Percent Law. In fact, they endorse it as a race-neutral alternative to the *Grutter* plan. A court considering the constitutionality of the Law would examine whether Texas enacted the Law (and corresponding admissions policies) because of its effects on identifiable racial groups or in spite of those effects. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979); *cf.* Brief of Social Scientists Glenn C. Loury et al. as *Amici Curiae* in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), *available at* 2003 WL 402129, at *2, *9–*10 (noting that "it is not clear that [percentage] plans are actually race-neutral" and that some *amici* counsel in *Grutter* "have signaled interest in moving on after this case to challenge these aspects of the Texas program").

the Supreme Court's studied structure for the use of race in university admissions decisions. It casts aside testing historically relied upon, admitting many top ten percent minorities with significantly lower scores than rejected minorities and non-minorities alike. That these admitted minorities are academically able to remain in the University does not respond to the reality that the Top Ten Percent Law eliminated the consideration of test scores, and correspondingly reduced academic selectivity, to produce increased enrollment of minorities. Such costs may be intrinsic to affirmative action plans. If so, *Grutter* at least sought to minimize those costs through narrow tailoring. The Top Ten Percent Law is anything but narrow.

In short, while the Top Ten Percent Law appears to succeed in its central purpose of increasing minority enrollment, it comes at a high cost and is at best a blunt tool for securing the educational benefits that diversity is intended to achieve. We cannot fault UT's contention that the Top Ten Percent Law is plainly not the sort of workable race-neutral alternative that would be a constitutionally mandated substitute for race-conscious university admissions policies. We are keenly aware that the University turned to the Top Ten Percent Law in response to a judicial ruling. Yet we cannot agree that it is irrelevant. To the contrary, that the Top Ten Percent Law, accounting for the vast majority of in-state admissions, threatens to erode the foundations UT relies on to justify implementing *Grutter* policies is a contention not lacking in force. "Facially neutral" has a talismanic ring in the law, but it can be misleading. It is here.

Appendix E

VII. CRITICAL MASS

Appellants contend that UT's decision to reintroduce race-conscious admissions was unconstitutional because minority enrollment already met or exceeded "critical mass" when this decision was made, and thus any further facial consideration of race was neither warranted nor constitutional. Appellants claim the best measure of whether UT had attained the benefits of diversity is the raw percentage of minorities enrolled. As a result of the combined effects of changing demographics, targeted high school programs, and the Top Ten Percent Law, total minority enrollment had increased over the years. When the decision was made to reintroduce race-conscious admissions in 2004, underrepresented minorities made up 21.4% of the incoming class (4.5% African–American and 16.9% Hispanic).[157]

Although Texas was not constitutionally required to enact the Top Ten Percent Law, Appellants are correct that the decision to do so—and the substantial effect on aggregate minority enrollment at the University—places at risk UT's race-conscious admissions policies. We are confident, and hold, that a *Grutter*-style admissions system standing alone is constitutional. That said, whether to overlay such a plan with the Top Ten Percent Law and how to calibrate its flow presents a Hobson's choice between the minority students it contributes and the test of constitutional bounds it courts. True enough, the Top Ten Percent Law is in a sense, perhaps a controlling sense,

157. *Fisher*, 645 F.Supp.2d at 593.

a "facially" race-neutral plan. But it was animated by efforts to increase minority enrollment, and to the extent it succeeds it is because at key points it proxies for race.

A

Appellants propose various baseline levels of diversity which, they suggest, would fully satisfy the University's interest in attaining critical mass. They first argue that if "from 13.5 to 20.1 percent" minority enrollment was adjudged to be great enough diversity each year by Michigan's Law School in *Grutter*, then the 21.4% minority enrollment that UT had achieved prior to reintroducing race-conscious admissions must already have achieved critical mass. We find this comparison inapt for numerous reasons.

Appellants' comparison presumes that critical mass must have some fixed upper bound that applies across different schools, different degrees, different states, different years, different class sizes, and different racial and ethnic subcomposition. It is based on Appellants' continued insistence that the concept of critical mass is defined by the minimum threshold for minority students to have their ideas represented in class discussions and not to feel isolated or like spokespersons for their race. As we have discussed, *Grutter* firmly rejects that premise and defines critical mass by reference to a broader view of diversity.

At oral argument, Appellants qualified this insistence and wisely conceded that what constitutes critical mass

in the eyes of one school might not suffice at another. *Grutter* concerned a law school, whereas Appellants challenge UT's undergraduate program. Michigan's Law School operates on a national level, while UT focuses on recruiting and producing future leaders for Texas. The law school enrolled approximately 350 students in its first-year class, few enough students that diversity in the student body readily approximates diversity in the classroom. In contrast, UT enrolls approximately 7,000 undergraduates in its first-year class and has data showing diversity rates vary widely across individual classrooms. African-Americans and Hispanics never represented more than a combined 14.8% of the Michigan Law School's applicant pool during the examined time period,[158] while those same underrepresented minorities were 28% of UT's freshman applicant pool for Fall 2008.[159]

Appellants point to the Supreme Court's observation in *United States v. Virginia* that the Virginia Military Institute "could achieve at least 10% female enrollment—a sufficient critical mass to provide the female cadets with a positive educational experience."[160] But this figure, even if accurate, covers only one component of the multi-faceted concept of diversity elaborated in *Grutter*. In any event, the claim that 10% minority enrollment is a ceiling to critical mass is confounded by *Grutter*.

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158. *Grutter*, 539 U.S. at 384, 123 S.Ct. 2325 tbls.1–2 (Rehnquist, C.J., dissenting).

159. *2008 Top Ten Percent Report* at 6 tbl.1.

160. 518 U.S. 515, 523, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) (internal quotation marks omitted).

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Appellants lastly note that minority enrollment at UT now exceeds the level it had reached in the mid–1990s, pre- *Hopwood*, when the University was free to obtain any critical mass it wanted through overtly race-based decisions. UT responds that it has consistently maintained, both in the *2004 Proposal* and before this Court, that even before *Hopwood* it had never reached critical mass.[161] While UT was making a greater use of race in that era, its pursuit of diversity was constrained by other interests, such as admitting only well-qualified students. We cannot assume that diversity levels immediately before *Hopwood* were indicative of critical mass. Moreover, minority enrollment in 1996 is not indicative of UT's true pre- *Hopwood* diversity. While admissions decisions in 1996 were not controlled by *Hopwood*, the case impacted enrollment, resulting in fewer minority students. If one instead compares minority enrollment from 1989 to 2004, a different picture emerges. In 2004, UT enrolled significantly fewer African–Americans than it had in 1989 (309 compared to 380). In addition, the 2004 entering class consisted of only 100 more Hispanics than the 1989 class, a low number considering the vast increases in the Hispanic population of Texas. Further, the *2004 Proposal* demonstrated that the percentage of diverse classrooms had declined since 1996.[162] The decrease in classroom diversity will only continue if additional minority representation is not achieved, as the University plans to increase its number of course offerings in future

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161. *See, e.g., 2004 Proposal* at 24 ("[R]estoration to pre-*Hopwood* levels is not sufficient.").

162. *Id.* at 25 & tbl.8.

years. Finally, whatever levels of minority enrollment sufficed more than a decade ago may no longer constitute critical mass today, given the social changes Texas has undergone during the intervening years. Appellants' proposed baselines are insufficient reason to doubt UT's considered, good faith conclusion that "the University still has not reached a critical mass at the classroom level."[163]

Grutter pointedly refused to tie the concept of "critical mass" to any fixed number. The *Grutter* Court approved of the University of Michigan Law School's goal of attaining critical mass even though the school had specifically abjured any numerical target.[164] The Court recounted how school officials had described "critical mass" only through abstract concepts such as "meaningful numbers," "meaningful representation," and "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated."[165] The type of broad diversity *Grutter* approved does not lend itself to any fixed numerical guideposts.

None of this is to say that *Grutter* left "critical mass" without objective meaning. Rather, the legally cognizable interest—attaining a critical mass of underrepresented minority students—"is defined by reference to the educational benefits that diversity is designed to

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163. *Id.* at 24 (quoted in *Fisher*, 645 F.Supp.2d at 602).

164. *Grutter*, 539 U.S. at 318, 123 S.Ct. 2325.

165. *Id.*

produce."[166] If a plaintiff produces evidence that calls into question a university's good faith pursuit of those educational benefits, its race-conscious admissions policies may be found unconstitutional. We are not persuaded, however, that any of the benchmarks suggested by Appellants succeed at calling that judgment into question.

B

As we have observed, benchmarks aside, UT's claim that it has not yet achieved critical mass is less convincing when viewed against the backdrop of the Top Ten Percent Law, which had already driven aggregate minority enrollment up to more than one-fifth of the University's incoming freshman class before less subtle race-conscious admissions were reintroduced.

The chief difficulty with looking to aggregate minority enrollment is that it lumps together distinct minority groups from different backgrounds who may bring various unique contributions to the University environment. African–American and Hispanic students, for example, are not properly interchangeable for purposes of determining critical mass, and a university must be sensitive to important distinctions within these broad groups. In *Parents Involved*, the Supreme Court specifically faulted two school districts for employing "only a limited notion of diversity" that lumped together very different racial groups.[167] One school district classified

166. *Id.* at 330, 123 S.Ct. 2325.

167. *Parents Involved*, 551 U.S. at 723, 127 S.Ct. 2738.

students exclusively as "white" or "nonwhite"; another labeled them as "black" or "other."[168] This "binary conception of race" runs headlong into the central teaching of *Grutter* and other precedents which instruct that a university must give serious and flexible consideration to all aspects of diversity.[169]

On this record, we must conclude that the University has acted with appropriate sensitivity to these distinctions. Although the aggregate number of underrepresented minorities may be large, the enrollment statistics for individual groups when UT decided to reintroduce race as a factor in admissions decisions does not indicate critical mass was achieved. Further, we recognize that some year-to-year fluctuation in enrollment numbers is inevitable, so statistics from any single year lack probative force; the University needs to maintain critical mass in years when yield is low just as it does when yield is high.

It is also apparent that UT has given appropriate consideration to whether aggregate minority enrollment is translating into adequate diversity in the classroom. Through two separate studies, the *2004 Proposal* reached a serious and good faith determination that the aggregate number overstates the University's true level of diverse interaction. UT sought to obtain the full educational benefits of diversity as approved in *Grutter* and properly concluded that race-conscious admissions measures would help accomplish its goals.

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168. *Id.* at 712, 716, 127 S.Ct. 2738.

169. *Id.* at 735, 127 S.Ct. 2738. Even current labels of "Hispanic," "African–American," or "Asian" may lump very different ethnic groups into a single category.

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C

Appellants argue that even if UT had not yet achieved critical mass under race-neutral policies, it had come close enough that the reintroduction of race-conscious measures was unwarranted. Pointing to the Supreme Court's recent decision in *Parents Involved*, they argue that the University's use of race is unnecessary, and therefore not narrowly tailored, because it has only a "minimal effect." The district court thought this was an attempt "to force UT into an impossible catch–22: on the one hand, it is well-established that to be narrowly tailored the means 'must be specifically and narrowly framed to accomplish' the compelling interest, but on the other hand, according to [Appellants], the 'narrowly tailored' plan must have more than a minimal effect."[170]

Parents Involved does not support the cost-benefit analysis that Appellants seek to invoke. Rather, *Parents Involved* was primarily a critique of the school districts' "extreme approach" that used binary racial categories to classify schoolchildren.[171] The Court referred to the "minimal effect" sought by this policy as evidence that other, more narrowly tailored means would be effective to serve the school districts' interests.[172] The Court did not hold that a *Grutter*-like system would be impermissible even after race-neutral alternatives have been exhausted because the gains are small. To the contrary, Justice Kennedy—who provided the fifth vote in *Parents*

170. *Fisher*, 645 F.Supp.2d at 609.

171. *Parents Involved*, 551 U.S. at 735, 127 S.Ct. 2738.

172. *Id.* at 733, 127 S.Ct. 2738.

Involved—wrote separately to clarify that "a more nuanced, individual evaluation .... informed by *Grutter*" would be permissible, even for the small gains sought by the school districts.[173]

VIII. CONCLUSION

Mindful of the time frame of this case, we cannot say that under the circumstances before us UT breached its obligation to undertake a "serious, good faith consideration" before resorting to race-conscious measures; yet we speak with caution. In this dynamic environment, our conclusions should not be taken to mean that UT is immune from its obligation to recalibrate its dual systems of admissions as needed, and we cannot bless the university's race-conscious admissions program in perpetuity. Rather, much like judicial approval of a state's redistricting of voter districts, it is good only until the next census count—it is more a process than a fixed structure that we review. The University's formal and informal review processes will confront the stark fact that the Top Ten Percent Law, although soon to be restricted to 75% of the incoming class, increasingly places at risk the use of race in admissions. In 1998, those admitted under the Top Ten Percent Law accounted for 41% of the Texas residents in the freshman class, while in 2008, top ten percent students comprised 81% of enrolled Texan freshmen.[174] This trajectory evidences a risk of eroding the necessity of using race to achieve critical mass with accents that may, if persisted in, increasingly present

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173. *Id.* at 790, 127 S.Ct. 2738 (opinion of Kennedy, J.).

174. *2008 Top Ten Percent Report* at 7 tbl.1a.

as an effort to meet quantitative goals drawn from the demographics of race and a defiance of the now-demanded focus upon individuals when considering race.

A university may decide to pursue the goal of a diverse student body, and it may do so to the extent it ties that goal to the educational benefits that flow from diversity. The admissions procedures that UT adopted, modeled after the plan approved by the Supreme Court in *Grutter*, are narrowly tailored—procedures in some respects superior to the *Grutter* plan because the University does not keep a running tally of underrepresented minority representation during the admissions process. We are satisfied that the University's decision to reintroduce race-conscious admissions was adequately supported by the "serious, good faith consideration" required by *Grutter*. Finally, it is neither our role nor purpose to dance from *Grutter*'s firm holding that diversity is an interest supporting compelling necessity. Nor are we inclined to do so. The role of black athletes in the southern universities forty years ago presents diversity's potential better than can we, although at that early juncture, it was ability overcoming a barrier of race.[175]

The judgment of the district court is AFFIRMED.

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175. *See* David K. Wiggins & Patrick B. Miller, THE UNLEVEL PLAYING FIELD: A DOCUMENTARY HISTORY OF THE AFRICAN AMERICAN EXPERIENCE IN SPORT 443 (2003) (quoting Roy Wilkins, who wrote in the 1930s that black athletes "carry more interracial education than all the erudite philosophy ever written on race" (internal quotation marks omitted)).

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KING, Circuit Judge, specially concurring:

I concur in the judgment and in the analysis and application of *Grutter* in Judge Higginbotham's opinion. No party challenged, in the district court or in this court, the validity or the wisdom of the Top Ten Percent Law. We have no briefing on those subjects, and the district court did not consider them. Accordingly, I decline to join Judge Higginbotham's opinion insofar as it addresses those subjects.

EMILIO M. GARZA, Circuit Judge, specially concurring:

Whenever a serious piece of judicial writing strays from fundamental principles of constitutional law, there is usually a portion of such writing where those principles are articulated, but not followed. So it goes in *Grutter*, where a majority of the Court acknowledged strict scrutiny as the appropriate level of review for race-based preferences in university admissions, but applied a level of scrutiny markedly less demanding. To be specific, race now matters in university admissions, where, if strict judicial scrutiny were properly applied, it should not.

Today, we follow *Grutter*'s lead in finding that the University of Texas's race-conscious admissions program satisfies the Court's unique application of strict scrutiny in the university admissions context. I concur in the majority opinion, because, despite my belief that *Grutter* represents a digression in the course of constitutional law, today's opinion is a faithful, if unfortunate, application of that misstep. The Supreme Court has chosen this

erroneous path and only the Court can rectify the error. In the meantime, I write separately to underscore this detour from constitutional first principles.

I

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. One of the Amendment's "core principles" is to "do away with all governmentally imposed discriminations based on race," *Palmore v. Sidoti*, 466 U.S. 429, 432, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984), and to create "a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement." *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505–06, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). This is why "[r]acial and ethnic distinctions of any sort are inherently suspect and ... call for the most exacting judicial examination." *Miller v. Johnson*, 515 U.S. 900, 904, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.)). It matters not whether the racial preference is characterized as invidious or benign: strict scrutiny applies regardless of "the race of those burdened or benefitted by a particular classification." *Shaw v. Reno*, 509 U.S. 630, 650–51, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (quoting *Croson*, 488 U.S. at 494, 109 S.Ct. 706). To survive such exacting scrutiny, laws classifying citizens on the basis of race must be "narrowly tailored to achieving a compelling state interest." *Miller*, 515 U.S. at 904, 115 S.Ct. 2475.

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In *Grutter*, the majority acknowledged these fundamental principles, *see Grutter v. Bollinger*, 539 U.S. 306, 326–27, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), but then departed and held, for the first time, that racial preferences in university admissions could be used to serve a compelling state interest. *Id.* at 328, 123 S.Ct. 2325. Though the Court recognized that strict scrutiny should govern the inquiry into the use of race in university admissions, *id.* at 326, 123 S.Ct. 2325, what the Court applied in practice was something else entirely.

A

The *Grutter* majority asserts that "[s]trict scrutiny is not 'strict in theory, but fatal in fact.' " 539 U.S. at 326, 123 S.Ct. 2325 (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995)). But since the Court began applying strict scrutiny to review governmental uses of race in discriminating between citizens, the number of cases in which the Court has permitted such uses can be counted on one hand.[1]

1. *See Grutter*, 539 U.S. at 328, 123 S.Ct. 2325 (recognizing racial diversity "in the context of higher education" as compelling); *Freeman v. Pitts*, 503 U.S. 467, 494, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992) (remedying the effects of past intentional discrimination a compelling governmental interest); *Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193, 89 L.Ed. 194 (1944) ("[P]ressing public necessity may sometimes justify the existence of [racial discrimination]; racial antagonism never can."). In *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), the Court upheld a federal law that set aside public works monies for minority-owned businesses. Although *Fullilove* has not been expressly overruled, it is unlikely that its holding

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The Court has rejected numerous intuitively appealing justifications offered for racial discrimination, such as remedying general societal discrimination, *see Croson*, 488 U.S. at 496–98, 109 S.Ct. 706 (plurality opinion); enhancing the number of minority professionals available to work in underserved minority communities, *see Bakke*, 438 U.S. at 310–11, 98 S.Ct. 2733 (opinion of Powell, J.); and providing role models for minority students, *see Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275–76, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion). In all of these cases, the Court found that the policy goals offered were insufficiently compelling to justify discrimination based on race.

In those rare cases where the use of race properly furthered a compelling state interest, the Court has emphasized that the means chosen must "work the least harm possible," *Bakke*, 438 U.S. at 308, 98 S.Ct. 2733 (opinion of Powell, J.), and be narrowly tailored to fit the interest "with greater precision than any alternative means." *Grutter*, 539 U.S. at 379, 123 S.Ct. 2325 (Rehnquist, C.J., dissenting) (quotation omitted). Moreover, the failure to consider available race-neutral alternatives and employ them if efficacious would cause a program to fail strict scrutiny. *See Wygant*, 476 U.S. at 280 n. 6, 106 S.Ct. 1842 (plurality opinion) (the "term 'narrowly tailored' ... requires consideration of whether lawful alternative and less restrictive means could have

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survives the Court's later Equal Protection decisions. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.3.5, at 738, 742–43 (3d ed.2006). *Korematsu*'s authority is likewise suspect.

been used."); *see also Adarand*, 515 U.S. at 237–38, 115 S.Ct. 2097; *Croson*, 488 U.S. at 507, 109 S.Ct. 706; *Fullilove v. Klutznick*, 448 U.S. 448, 537, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) (Stevens, J., dissenting) ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.").

Beyond the use of race-neutral alternatives, the Court, pre-*Grutter*, had considered several other factors in determining whether race-conscious programs were narrowly tailored. Programs employing a quota system would fail this inquiry, as would programs of unlimited duration. *See Bakke*, 438 U.S. at 315–18, 98 S.Ct. 2733; *Croson*, 488 U.S. at 498, 109 S.Ct. 706. The Court looked to a program's flexibility and its capacity for individualized consideration. *See United States v. Paradise*, 480 U.S. 149, 177, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987) (plurality opinion); *Croson*, 488 U.S. at 508, 109 S.Ct. 706. The Court also considered the relationship between the numerical goal and the percentage of minority group members in the relevant population, and whether the means chosen were likely to be overinclusive. *See Croson*, 488 U.S. at 506–10, 109 S.Ct. 706. Finally, the Court considered the program's burden on innocent third parties. *See, e.g., Metro Broad., Inc. v. FCC*, 497 U.S. 547, 630, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990) (O'Connor, J., dissenting) (programs should not "unduly burden individuals who are not members of the favored racial and ethnic groups"); *Bakke*, 438 U.S. at 308, 98 S.Ct. 2733 (opinion of Powell, J.).

Grutter changed this. After finding that racial diversity at the University of Michigan Law School ("Law

School") was a compelling governmental interest, the Court redefined the meaning of narrow tailoring. *See Grutter*, 539 U.S. at 387, 123 S.Ct. 2325 (Kennedy, J., dissenting) ("The Court, however, does not apply strict scrutiny. By trying to say otherwise, it undermines both the test and its own controlling precedents."); *see generally* Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After* Grutter *and* Gratz, 85 TEX. L. REV. 517 (2007). The Court replaced narrow tailoring's conventional "least restrictive means" requirement with a regime that encourages opacity and is incapable of meaningful judicial review under any level of scrutiny. Courts now simply assume, in the absence of evidence to the contrary, that university administrators have acted in good faith in pursuing racial diversity, and courts are required to defer to their educational judgments on how best to achieve it. *Grutter*, 539 U.S. at 328–29, 123 S.Ct. 2325. What is more, the deference called for in *Grutter* seems to allow universities, rather than the courts, to determine when the use of racial preferences is no longer compelling. *See id.* at 343, 123 S.Ct. 2325 ("We take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable."). This new species of strict scrutiny ensures that only those admissions programs employing the most heavy-handed racial preferences, and those programs foolish enough to maintain and provide conclusive data, will be subject to "exacting judicial examination." *Miller*, 515 U.S. at 904, 115 S.Ct. 2475. Others, like the University of Michigan in *Grutter*, and the University of Texas here, can get away with something less.

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B

Setting aside for a moment *Grutter*'s finding that racial diversity within the Law School was a compelling state interest, *see infra* Sections I.D and III, I find troubling the Court's treatment of whether the Law School's chosen means—using race as a "plus" factor—was narrowly tailored to achieving that end. The Court discussed five hallmarks of a narrowly tailored race-conscious admissions program in answering this question: (1) the absence of quotas; (2) a program that does not unduly harm any racial group; (3) serious, good-faith consideration of race-neutral alternatives; (4) a program that contains a sunset provision or some logical end point; and (5) individualized consideration of all applicants. *See* 539 U.S. at 335–43, 123 S.Ct. 2325. The Court's opinion effectively emptied at least three of these criteria of their probative content, leaving the first and fifth as determinative in any narrow tailoring inquiry. *See* Ayres & Foster, 85 TEX. L. REV. at 543.

First, *Grutter* defined a quota as reserving a fixed number or percentage of opportunities for certain minority groups, and insulating individuals from those groups from competition with all other candidates for available seats. *Id.* at 333–36, 123 S.Ct. 2325. These prohibitions were clear well before *Grutter*. *See Bakke*, 438 U.S. at 317, 98 S.Ct. 2733; *Croson*, 488 U.S. at 496, 109 S.Ct. 706. Only those programs with overt numerical set-asides or separate minority admissions tracks would fail this requirement.

Next, the Court found that race-conscious admissions programs do not unduly burden innocent third parties so long as they provide individualized consideration. *Grutter*, 539 U.S. at 341, 123 S.Ct. 2325 ("[I]n the context of its individualized inquiry into the possible diversity contributions of all applicants, the Law School's race-conscious admissions program does not unduly harm nonminority applicants."). Here, the Court collapsed the second narrow tailoring criterion into the fifth.

Grutter also held that there were no workable race-neutral alternatives at the Law School, such as "using a lottery system" or "decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores." *Id.* at 340, 123 S.Ct. 2325. The Court likewise rejected the United States' argument that the Law School's plan was not narrowly tailored because race-neutral alternatives that had proven effective elsewhere (i.e., the percentage plans utilized in California, Florida, and Texas) were available and would deliver the educational benefits the Law School was seeking. *Id.* The Court held that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative .... Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." *Id.* at 339, 123 S.Ct. 2325. After *Grutter*, universities are no longer required to use the *most effective* race-neutral means. So long as admissions officials have given "serious, good faith consideration" to such programs, they are free to pursue less effective alternatives that serve the interest "about as well." *Id.* (citing *Wygant*, 476 U.S. at 280 n. 6, 106 S.Ct.

1842 (plurality opinion)). Thus, this third criterion is now essentially without meaning. Given the deference that universities' educational judgments are to be afforded post- *Grutter*, "serious, good faith consideration" is a peculiarly low bar that will be satisfied in most every case. *Compare id.* at 339, 123 S.Ct. 2325 (narrow tailoring "require[s] serious, good faith consideration of workable race-neutral alternatives"), *with id.* at 329, 123 S.Ct. 2325 ("[G]ood faith on the part of a university is 'presumed' absent a showing to the contrary.") (citation and internal quotation marks omitted).

Finally, while the Court acknowledged that race-conscious admissions programs must be limited in time, such as by sunset provisions or periodic reviews to determine whether the preferences remain necessary, the Court suspended application of this criterion for twenty-five years. *Id.* at 343, 123 S.Ct. 2325 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."). In doing so, the *Grutter* majority simply accepted the Law School's promise that it would terminate its race-conscious policies as soon as possible. *See id.* at 343, 123 S.Ct. 2325 ("We take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable."). The Court's approval here is remarkable given the constitutional gravity of this experiment (i.e., the Law School's allocation of preferences along racial lines). This fourth criterion will now be considered satisfied with little or no showing on the part of university administrators, at least until 2028.

And thus, all that truly remains of strict scrutiny's narrow tailoring inquiry post-*Grutter* is the requirement of "individualized consideration." But what does this term mean specifically? *Grutter* never tells us. Moreover, the weight given to race as part of this individualized consideration is purposefully left undefined, making meaningful judicial review all but impossible.

C

In *Grutter*, the University of Michigan Law School sought to achieve a student body that was both academically strong and diverse along several dimensions, including race. There, the Court endorsed the Law School's "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment." *Id.* at 337, 123 S.Ct. 2325. The Court noted approvingly that the Law School had "no policy ... of automatic acceptance or rejection based on any single 'soft' variable." *Id.* The *Grutter* majority permitted the use of race and ethnicity as "plus" factors within the Law School's holistic review, but this simply raises the question: how much of a plus?[2] *Grutter* did not say.

Instead, the Court implicitly forbade universities from quantifying racial preferences in their admissions calculus. Contrasting the admissions system found

2. The Court's discussion of race as a "plus" factor takes place in the context of strict scrutiny's narrow tailoring inquiry. Whether race should be considered at all is a separate, more fundamental, matter. *See infra* Section III.

unconstitutional in *Gratz*, the *Grutter* majority noted that "the Law School awards no mechanical, predetermined diversity 'bonuses' based on race or ethnicity." *Id.* (citing *Gratz v. Bollinger*, 539 U.S. 244, 271–72, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003)). On this view, rigid point systems that allocate preference points for racial and ethnic status are unconstitutional because they "preclude[ ] admissions counselors from conducting the type of individualized consideration the Court's opinion in *Grutter* requires." *Gratz*, 539 U.S. at 277, 123 S.Ct. 2411 (O'Connor, J., concurring) (citation omitted).

But it is not clear, to me at least, how using race in the holistic scoring system approved in *Grutter* is constitutionally distinct from the point-based system rejected in *Gratz*.[3] If two applicants, one a preferred minority and one nonminority, with application packets *identical* in all respects save race would be assigned the

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3. Although I do not believe the government's use of race in university admissions can ever serve a compelling interest, assuming that it can, there is no reason why a well-designed point system could not account for an applicant's race, among other variables, and yet still provide meaningful, individualized consideration. *See* Ayres & Foster, 85 TEX. L. REV. at 566–70; *see also Gratz*, 539 U.S. at 295, 123 S.Ct. 2411 (Souter, J., dissenting) ("[I]t is hard to see what is inappropriate in assigning some stated value to a relevant characteristic, whether it be reasoning ability, writing style, running speed, or minority race. Justice Powell's plus factors necessarily are assigned some values. The college simply does by a numbered scale what the law school accomplishes in its 'holistic review'; the distinction does not imply that applicants to the undergraduate college are denied individualized consideration ...." (citation omitted)).

same score under a holistic scoring system, but one gets a higher score when race is factored in, how is that different from the mechanical group-based boost prohibited in *Gratz?* Although one system quantifies the preference and the other does not, the result is the same: a determinative benefit based on race.

Grutter's new terminology like "individualized consideration" and "holistic review" tends to conceal this result. By obscuring the University of Michigan's use of race in these diffuse tests, the Court allowed the Law School to do covertly what the undergraduate program could not do overtly. *See Gratz*, 539 U.S. at 270–76, 123 S.Ct. 2411. This much is clear and has been discussed elsewhere.[4] I write separately to add my view, confirmed while deciding this appeal, that *Grutter*'s narrow tailoring inquiry—now reduced to testing for individualized consideration—is incapable of meaningful judicial review.

Traditionally, strict scrutiny required that the overall benefits of programs employing racial classifications justified the overall costs.[5] *See* Ayres & Foster, 85 TEX. L. REV. at 526 & n. 38. In *Grutter*, not only did the Court fail

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4. *See, e.g.*, Larry Alexander & Maimon Schwarzschild, Grutter *or Otherwise: Racial Preferences and Higher Education*, 21 CONST. COMMENT. 3 (2004); CHEMERINSKY, CONSTITUTIONAL LAW 744.

5. For example, a race-conscious admissions policy that added just one, three, or five members of a preferred minority group to an enrolling class of 6,700 would fail to be narrowly tailored. Such a program would have an intolerably high cost for little return. *See infra* Section II.

to conduct such an analysis, it rejected the only means for measuring the constitutionally relevant costs and benefits. *Id.* Although I disagree with the Court that race-conscious policies can ever serve a compelling interest in university admissions, by prohibiting race and ethnicity from being quantified at all, *Grutter* eliminated any chance for courts to critically evaluate whether race is, in fact, the defining feature of an admissions packet. Post- *Grutter*, there is no way to assess how much of a "plus" race gets as a plus-factor in any admissions system. And without the ability to measure the number of "but-for" admits (i.e., admitted minority students for whom race was the decisive factor), courts cannot meaningfully evaluate whether a university's use of race fits its asserted interest narrowly. *See id.* at 527–41, 575–82.[6] In short, it is impossible to subject such uses of race to strict scrutiny. *Grutter* rewards admissions programs that remain opaque.

Even assuming the Court's "educational benefits of diversity" justification holds true, *see infra* Section I.D, there are far more effective *race-neutral* means of screening for the educational benefits that states like Michigan and Texas ostensibly seek. To the degree that state universities genuinely desire students with diverse

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6. *See also id.* at 528 n. 42 (citing, *inter alia*, WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 31–39 (1998)) (observing that the degree of racial preferences can be measured by examining the number of but-for admits and the qualification differentials between but-for admits and nonpreferred applicants who would have been admitted in the absence of affirmative action).

backgrounds and experiences, race-neutral factors like specific hardships overcome, extensive travel, leadership positions held, volunteer and work experience, dedication to particular causes, and extracurricular activities, among many other variables, can be articulated with specificity in the admissions essays.[7] These markers for viewpoint diversity are far more likely to translate into enhanced classroom dialogue than a blanket presumption that race will do the same. Moreover, these markers represent the kind of life experiences that reflect industry. Race cannot. While race inevitably colors an individual's life and views, that facet of race and its impact on the individual can be described with some precision through an admissions essay. We should not presume that race shapes everyone's experiences in the same ways and award preference (or a bonus, or a "plus") accordingly. Such a policy, however labeled, is not narrowly tailored.

Finally, the Court's unusual deference to educators' academic judgments that racial diversity is a compelling interest, coupled with the deference allegedly owed to

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7. In addition to the two essays that UT requires as part of each application packet, the University considers several of the factors described above in determining an applicant's personal achievement score. *See Fisher v. Univ. of Tex. at Austin*, 645 F.Supp.2d 587, 597 (W.D.Tex.2009) ("The third [Personal Achievement Index] element is the personal achievement score, which is based on an evaluation of the file in its entirety by senior members of the admissions staff. The evaluators conduct a holistic review considering the applicant's demonstrated leadership qualities, extracurricular activities, awards and honors, work experience, service to the school or community, and special circumstances.").

their determination of when the use of race is no longer necessary, *see id.* at 343, 123 S.Ct. 2325, would appear to permit race-based policies indefinitely. For example, notwithstanding that a university's race-conscious policies had achieved 25% African–American and 25% Hispanic enrollment in the student body generally, that university could still justify the use of race in admissions if these minority students were disproportionately bunched in a small number of classes or majors. In fact, the majority's application of *Grutter* today reaches just such a result.

Despite Top Ten Percent's demonstrable impact on minority enrollment at the University of Texas, the majority opinion holds that the University's use of race in admissions can be justified by reference to the paucity of minority students in certain majors:

> While the [Top Ten Percent] Law may have contributed to an increase in overall minority enrollment, those minority students remain clustered in certain programs, severely limiting the beneficial effects of educational diversity. For example, nearly a quarter of the undergraduate students in UT's College of Social Work are Hispanic, and more than 10% are African–American. In the College of Education, 22.4% of students are Hispanic and 10.1% are African–American. By contrast, in the College of Business Administration, only 14.5% of the students are Hispanic and 3.4% are African–American. It is evident that if UT is to have diverse interactions, it needs more

> minority students who are interested in and meet the requirements for a greater variety of colleges, not more students disproportionately enrolled in certain programs.

Ante at 240. If this is so, a university's asserted interested in racial diversity could justify race-conscious policies until such time as educators certified that the elusive critical mass had finally been attained, not merely in the student body generally, but major-by-major and classroom-by-classroom.

Given the "large-scale absence of African–American and Hispanic students from thousands of classes" at the University of Texas, *Fisher*, 645 F.Supp.2d at 607, today's decision ratifies the University's reliance on race at the departmental and classroom levels, and will, in practice, allow for race-based preferences in seeming perpetuity. Such a use of race "has no logical stopping point" and is not narrowly tailored. *See Croson*, 488 U.S. at 498, 109 S.Ct. 706 (citing *Wygant*, 476 U.S. at 275, 106 S.Ct. 1842). Allowing race-based social engineering at the university level is one thing, but not nearly as invasive as condoning it at the classroom level. I cannot accept that the Fourteenth Amendment permits this level of granularity to justify dividing students along racial lines.

D

The same imprecision that characterizes *Grutter*'s narrow tailoring analysis casts doubt on its discussion of racial diversity as a compelling state interest. *Grutter*

found that the Law School had a compelling interest in "securing the educational benefits of a diverse student body," and that achieving a "critical mass" of racially diverse students was necessary to accomplish that goal. *Id.* at 333, 123 S.Ct. 2325. The Law School defined "critical mass" as "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated ... or like spokespersons for their race." *Id.* at 318–19, 123 S.Ct. 2325. The Court clarified: "critical mass is defined by reference to the educational benefits that diversity is designed to produce." *Id.* at 330, 123 S.Ct. 2325. Justice O'Connor's majority opinion identified three such constitutionally relevant benefits: (i) increased perspective in the classroom; (ii) improved professional training; and (iii) enhanced civic engagement. *Id.* at 330–33, 123 S.Ct. 2325. The first element is based on Justice Powell's focus in *Bakke* on the campus-level benefits of diversity. The second two are new.[8]

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8. *See* Robert C. Post, *The Supreme Court, 2002 Term—Forward: Fashioning the Legal Constitution: Culture, Courts, and Law,* 117 HARV. L. REV. . 4, 59–60 (2003) ("Although *Grutter* casts itself as merely endorsing Justice Powell's opinion in Bakke, *Grutter*'s analysis of diversity actually differs quite dramatically from Powell's. Powell conceptualized diversity as a value intrinsic to the educational process itself. He regarded diversity as essential to 'the quality of higher education,' because education was a practice of enlightenment, 'of speculation, experiment, and creation,' that thrived on the 'robust exchange of ideas; characteristically provoked by confrontation between persons of distinct life experiences .... [*Grutter*] instead conceives of education as instrumental for the achievement of extrinsic social goods like professionalism, citizenship, or leadership .... *Grutter*'s justifications for diversity thus potentially reach far more widely than do Powell's."); *see also* Ayres & Foster, 85 TEX. L. REV. at 578 n.215 (citing commentary).

Appendix E

My difficulty with *Grutter*'s "educational benefits of diversity" discussion is that it remains suspended at the highest levels of hypothesis and speculation. And unlike ordinary hypotheses, which must be testable to be valid, *Grutter*'s thesis is incapable of testing. Justice O'Connor's majority opinion rests almost entirely on intuitive appeal rather than concrete evidence.

1

The first constitutionally relevant benefit that makes up *Grutter*'s compelling interest is racial diversity's direct impact in the classroom. Here, the Court concluded that diverse perspectives improve the overall quality of education because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting when students have the greatest possible variety of backgrounds." *Id.* at 330, 123 S.Ct. 2325 (internal quotation marks omitted). This rationale conforms to Justice Powell's opinion in *Bakke* that universities should pursue "[t]he atmosphere of speculation, excitement and creation" that is "promoted by a diverse student body." 438 U.S. at 312, 98 S.Ct. 2733 (opinion of Powell, J.).[9] I question the validity of this surmise.

Nonetheless, assuming a critical mass of minority students could perceptibly improve the quality of classroom learning, how would we measure success? By polling students and professors, as the University of Texas

9. Justice Powell's opinion in *Bakke* conspicuously avoided claiming a categorical educational benefit of diversity, asserting only the potential for such benefits. *See* 438 U.S. at 314, 98 S.Ct. 2733 (opinion of Powell, J.).

has done?[10] How would we know whether the substantial social harm we are tolerating by dividing students based on race is worth the cost? That classroom discussion is, in fact, being enhanced? How can a party prove that it is? How can an opposing party prove that it is not?

My concern with allowing viewpoint diversity's alleged benefits to justify racial preference is that viewpoint diversity is too theoretical and abstract. It cannot be proved or disproved. Sure, the *Grutter* majority cited to expert reports and amicus briefs from corporate employers as evidence that student body diversity improves educational outcomes and better prepares students for the workforce. *Id.* at 330, 123 S.Ct. 2325. But this support can be easily manipulated.[11] If all a university "need do is find ... report[s]," studies, or surveys to implement a race-conscious admissions policy, "the constraints of the Equal Protection Clause will, in effect, have been rendered a nullity." *Croson*, 488 U.S. at 504, 109 S.Ct. 706; *see also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n. 11, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994) ("[C]lassifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalizations."). *Grutter* permits race-based

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10. Every measure of social benefit or harm would be subjective and, at worst, capable of manipulation through framing biases.

11. *See* Alexander & Schwarzschild, 21 CONST. COMMENT. at 5 n.9 (criticizing the Court's undue reliance on amicus briefs from corporate employers).

preferences on nothing more than intuition—the type that strict scrutiny is designed to protect against. *See* 539 U.S. at 327, 123 S.Ct. 2325 ("Absent searching judicial inquiry into the justification for such race-based measures, we have no way to determine what classifications are benign or remedial and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.") (citation and internal quotation marks omitted).

Grutter and *Bakke* err by simply assuming that racial diversity begets greater viewpoint diversity. This inference is based on the assumption that members of minority groups, *because of* their racial status, are likely to have unique experiences and perspectives incapable of expression by individuals from outside that group. But as the Court has recognized elsewhere, the Constitution prohibits state decisionmakers from presuming that groups of individuals, whether classified by race, ethnicity, or gender, share such a quality collectively. *See Miller*, 515 U.S. at 914, 115 S.Ct. 2475 (the Equal Protection Clause forbids "the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from those of other citizens.") (citation omitted). There is no one African–American or Hispanic viewpoint,[12] and, in fact, *Grutter* approved the Law

12. For example, life experiences differ significantly if a Hispanic student's ethnicity originates in Mexico as opposed to Spain, or, for that matter, any of various Central and South American countries. Likewise, an African–American student whose roots come from Nigeria would be distinct in culture and ethnicity from a student whose ancestry originated in Egypt or Haiti. This same principle applies for students from non-preferred

School's diversity rationale precisely because of the role that racial diversity can play in dispelling such falsehoods. *See id.* at 320, 123 S.Ct. 2325 (citing expert testimony suggesting that "when a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students."); and *id.* at 333, 123 S.Ct. 2325 ("[D]iminishing the force of such stereotypes is a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students.").

Grutter sought to have it both ways. The Court held that racial diversity was necessary to eradicate the notion that minority students think and behave, not as individuals, but as a race. At the same time, the Court approved a policy granting race-based preferences on the assumption that racial status correlates with greater diversity of viewpoints.

2

Grutter's second asserted educational benefit of diversity relates to improved professional training. Here, Justice O'Connor writes that diversity "promotes cross-racial understanding, helps to break down racial

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racial classes. For example, second-generation students from English, Irish, Scottish, or Australian ancestry would come with very different cultural experiences, and yet all of these students would be grouped together as "White" in racial classification systems like the one used at the University of Texas.

stereotypes, and enables students to better understand persons of different races." *Id.* at 330, 123 S.Ct. 2325 (internal quotation marks and brackets omitted). Such training is essential, the argument goes, for future leaders who will eventually work within and supervise a racially diverse workforce. *Id.* at 330–31, 123 S.Ct. 2325.

State universities are free to define their educational goals as broadly as needed to serve the public interest. We defer to educators' professional judgments in setting those goals. *Grutter*, 539 U.S. at 328, 123 S.Ct. 2325 ("Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally proscribed limits."). My concern, discussed throughout this opinion, is not that *Grutter* commands such deference, but that it conflated the deference owed to a university's asserted interest with deference to the means used to attain it. *See id.* at 388, 123 S.Ct. 2325 (Kennedy, J., dissenting) ("The Court confuses deference to a university's definition of its educational objective with deference to the implementation of this goal.").

There is, however, one aspect of the Court's "improved professional training" rationale that I find especially troubling. While *Grutter* made much of the role that educational institutions play in providing professional training, *see id.* at 331, 123 S.Ct. 2325 ("We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship"), the cases the Court relied on involved primary and secondary schools. *See id.* (citing *Plyler v. Doe*, 457 U.S. 202, 221, 102

S.Ct. 2382, 72 L.Ed.2d 786 (1982) (describing education as pivotal to "sustaining our political and cultural heritage") and *ibid.* (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493, 74 S.Ct. 686, 98 L.Ed. 873 (1954) ("education ... is the very foundation of good citizenship.")). I question whether these cases apply with equal force in the context of higher education, where academic goals are vastly different from those pursued in elementary and secondary schools. Moreover, a university's self-styled educational goals, for example, promoting "cross-racial understanding" and enabling students "to better understand persons of different races," could just as easily be facilitated in many other public settings where diverse people assemble regularly: in the workplace, in primary and secondary schools, and in social and community groups. *See Grutter*, 539 U.S. at 347–48, 123 S.Ct. 2325 (Scalia, J., dissenting). I do not believe that the university has a monopoly on furthering these societal goals, or even that the university is in the best position to further such goals. Notwithstanding an institution's decision to expand its educational mission more broadly, the university's core function is to educate students in the physical sciences, engineering, social sciences, business and the humanities, among other academic disciplines.

3

Finally, *Grutter* articulated a third benefit of racial diversity in higher education: enhancing civic engagement. Here, the Court wrote that:

Appendix E

> Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.
>
> ...
>
> In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of educational institutions that provide this training .... Access to [higher] education ... must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.
>
> *Id.* at 332–33, 123 S.Ct. 2325.

Unlike the first two "educational benefits of diversity," which focused on improving classroom discussion and professional training, this third claimed benefit plainly has nothing to do with the university's core education and training functions. Instead, *Grutter* is concerned here with role that higher education plays in a democratic society, and the Court suggests that affirmative action

at public universities can advance a societal goal of encouraging minority participation in civic life.[13] This proposition lacks foundation.

If a significant portion of a minority community sees our nation's leaders as illegitimate or lacks confidence in the integrity of our educational institutions, as *Grutter* posits in the block quote above, *see id.*, 539 U.S. at 332, 123 S.Ct. 2325, I doubt that suspending the prevalent constitutional rules to allow preferred treatment for as few as 15–40 students, *see infra* Section II, is likely to foster renewed civic participation from among that community as a whole.[14]

Grutter replaced *Bakke's* emphasis on diversity in educational *inputs* with a new emphasis on diversity in

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13. *See* Lani Guinier, *The Supreme Court, 2002 Term—Comment: Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV.. 113, 174–76 (2003).

14. This is not to criticize universities, like the University of Texas, for implementing policies that seek to increase minority representation, not merely for its educational benefits on campus, but also for the secondary benefits that such increases in minority enrollment can have in the workplace and in society generally. A university degree confers professional and leadership opportunities unavailable otherwise, and ensuring that all segments of society have meaningful access to public institutions of higher education "represents a paramount government objective." *Grutter*, 539 U.S. at 331–32, 123 S.Ct. 2325 (citing Brief of United States as Amicus Curiae 13). I do not question this goal, but rather the constitutionality of using race to attain it.

educational *outputs*. By expanding Justice Powell's original viewpoint diversity rationale to include diversity's putative benefits in the workforce and beyond (i.e., inspiring a sense of civic belonging in discouraged minority communities), the Court has endorsed a compelling interest without bounds. Post- *Grutter*, it matters little whether racial preferences in university admissions are justified by reference to their potential for improved discussion in individual classrooms, or even at the university generally. Now such preferences can be justified based on their global impact. By removing the focus of attention from diversity's educational value at the campus level, the Court has ensured that the "educational benefits of diversity" will accommodate all university affirmative action plans as compelling.

E

Finally, by using metaphors, like "critical mass," and indefinite terms that lack conceptual or analytical precision, but rather sound in abject subjectivity, to dress up constitutional standards, *Grutter* fails to provide any predictive value to courts and university administrators tasked with applying these standards consistently. And notwithstanding the Court's nod to federalism, *Grutter*'s ambiguity discourages States from experimenting or departing from the one accepted norm. *See id.* at 342, 123 S.Ct. 2325 (citing *United States v. Lopez*, 514 U.S. 549, 581, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (Kennedy, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.")). In the

absence of clear guidance, public universities nationwide will simply model their programs after the one approved in *Grutter* rather than struggle with the risks and uncertain benefits of experimentation. That is exactly what has occurred here. With one exception—the Top Ten Percent law—the race-conscious admissions policy that we review today is identical to the program used at the Law School.

II

As mentioned at the outset, I concur in the opinion because I believe today's decision is a faithful application of *Grutter*'s teachings, however flawed I may find those teachings to be. I am compelled to follow the Court's unusual deference towards public university administrators in their assessment that racial diversity is a compelling interest, as well as the Court's refashioned narrow-tailoring inquiry. *See* 28 U.S.C. § 453. My difficulty is not necessarily with today's decision, but with the one that drives it. Nonetheless, there is one aspect of Judge Higginbotham's thoughtful opinion that gives me pause about whether *Grutter* compels the result we reach today. Ultimately, and regrettably, I recognize that the deference called for by *Grutter* may make this concern superfluous.

As today's opinion notes, the University of Texas's race-conscious admissions policy is nearly indistinguishable from the program approved by the Supreme Court in *Grutter*.[15] *Ante* at 216–17, 217–18, 230. As such, the

15. As a result, UT's policy suffers from all the same defects as the Law School policy evaluated in *Grutter* and discussed previously in this opinion. *See supra* Section I.

majority opinion summarily finds that, like the Law School in *Grutter*, the University of Texas has a compelling interest in obtaining the educational benefits of diversity in its undergraduate program. *Id.* at 230–31. After affording all deference due, today's decision focuses on the efficacy of the University's race-conscious admissions policy. *Id.* at 232–33 ("[W]hile we focus on the University's decision to adopt a *Grutter*-like plan, admissions outcomes remain relevant evidence of the plan's necessity—a reality check."). In my view, the efficacy of the University's race-based admissions policy is more than merely relevant, it is dispositive.

The plaintiffs here argue that the University of Texas's interest in obtaining a racially diverse student body is not compelling because the University has already achieved critical mass by way of Texas's Top Ten Percent law. *See* TEX. EDUC. CODE § 51.803 (1997). The University disagrees. This claim is difficult to evaluate. The University refuses to assign a weight to race or to maintain conclusive data on the degree to which race factors into admissions decisions and enrollment yields. *See Fisher*, 645 F.Supp.2d at 608–09 ("At no point in the process is race considered individually or given a numerical value; instead, the file is evaluated in its entirety in order to provide a better understanding of the student as a person and place her achievements in context."). Whether the University of Texas's use of race is narrowly tailored turns on whether its chosen means—using race as a plus factor in the University's holistic scoring system—are effective, not just in theory, but also in practice.

If, apart from the Top Ten Percent law, the University of Texas's race-conscious admissions program added just three-to-five African–American students, or five-to-ten Hispanic students, to an entering freshman class of 6,700, that policy would completely fail to achieve its aims and would not be narrowly tailored. *See* Ayres & Foster, 85 TEX. L. REV. at 523 n. 27 ("At least as a theoretical matter, narrow tailoring requires not only that the preferences not be too large, but also that they not be too small so as to fail to achieve the goals of the relevant compelling government interest."). The marginal benefit of adding just five or ten minority students to a class of this size would be negligible and have no perceptible impact on the "educational benefits that diversity is designed to produce." *Grutter,* 539 U.S. at 330, 123 S.Ct. 2325 ("[C]ritical mass is defined by reference to the educational benefits that diversity is designed to produce.").[16] This is especially so, if, as the district court suggests, "the large-scale absence of African–American and Hispanic students from thousands of classes indicates UT has not

16. *See Bakke,* 438 U.S. at 316, 98 S.Ct. 2733 (opinion of Powell, J.) (noting the "necessity of including more than a token number of black students"). *See also* Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes,* 72 HARV. EDUC. REV.. 330, 360–61 (2002) (enrolling "significant numbers of students of various groups" is necessary to enable students to "perceive differences both within groups and between groups"); Kathryn R.L. Rand & Steven Andrew Light, *Teaching Race Without a Critical Mass: Reflections on Affirmative Action and the Diversity Rationale,* 54 J. LEGAL. EDUC.. 316, 332–34 (2004) (noting that under a cost-benefit analysis it may be more difficult to justify an affirmative action program when a university is unable to enroll a critical mass of minority applicants).

reached sufficient critical mass for its students to benefit from diversity and illustrates UT's need to consider race as a factor in admissions in order to achieve those benefits." *Fisher,* 645 F.Supp.2d at 607 (citing statistics showing that in 2002, the University offered over 5,631 classes, 79% of which (4,448) had just one or zero African–American students; 30% of classes (1,689) had zero or one Hispanic students).[17] So, the controlling question is, "Is the University of Texas's race-conscious policy effective?" And by effective, I do not mean that every statistically insignificant gain (i.e., adding one, three, or five students at the margin) qualifies. The constitutional inquiry for me concerns whether the University's program meaningfully furthers its intended goal of increasing racial diversity on the road to critical mass. I find it does not.

In the 2008 admissions cycle, 29,501 students applied to the University of Texas. *See Fisher,* 645 F.Supp.2d at 590. Less than half, 12,843, were admitted and 6,715 ultimately enrolled.[18] *Id.* Of these enrolled students, 6,322

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17. These statistics represent all classes at UT with five or more students, including large lecture courses. For classes with five to 24 students—the most likely to foster the vibrant discussion described in *Grutter* and *Bakke*—the figures are more revealing. In 2002, UT offered 3,616 classes with five to 24 students. Of these, 90% had one or zero African–American students and 43% had one or zero Hispanic students. *See* Proposal to Consider Race and Ethnicity in Admissions, June 25, 2004 at 26, Table 8.

18. Today's decision, like the district court's, alternates between using statistics from admitted and enrolled students. If realizing the educational benefits of diversity is the University's asserted interest, only the data for enrolled students is relevant to our review.

came from Texas high schools.[19] *See Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin*, October 28, 2008 at 7 ("*2008 Top Ten Percent Report*"). 5,114 (80.9% of enrolled Texas residents) of these students were a product of Top Ten Percent, meaning that, at most, 1,208 (19.1%) enrolled non-Top Ten Percent Texas residents had been evaluated on the basis of their AI/PAI scores. *Id.*

Of the 363 African–American freshmen from Texas high schools that were admitted and enrolled (6% of the 6,322–member enrolling class from Texas high schools),

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19. In the discussion that follows, I use the number of enrolled Texas residents (6,322) as a baseline rather than the aggregate enrollment for first-time freshman (6,715). There are two reasons for this. First, this case asks us to decide the necessity of UT's race-conscious admissions policy in light of Texas's Top Ten Percent law. I find this question is evaluated most effectively by comparing enrollment data for Texas residents, which include precise figures for Top 10% and Non–Top 10% enrollees. Second, as the majority opinion recognizes, *ante* at 241–42 n. 155, the record does not include data showing what portion of the total applicant pool were Texas residents and what portion came from out-of-state. This is problematic. We know, for example, that the 2008 entering freshman class included 375 African–American and 1,338 Hispanic students, and that 363 and 1,322 of these students, respectively, were Texas residents. *See 2008 Top Ten Percent Report* at 6–7. So, although we know that the 2008 enrolling freshman class included 12 African–American and 16 Hispanic students from out-of-state, we cannot intelligently discuss the potential impact of UT's race-conscious policy on this data set without also having total application and admissions information available for non-Texas residents. This does not affect my conclusions—the number of non-Texas African–American and Hispanic students enrolled in the freshman class is statistically insignificant.

305 (4.8%) were a product of Top Ten Percent, while 58 (0.92%) African–American enrollees had been evaluated on the basis of their AI/PAI scores.[20] *See 2008 Top Ten Percent Report* at 7. For the 1,322 (21%) total enrolled in-state Hispanic students, 1,164 (18.4% of enrolled in-state students) were a product of Top Ten Percent, while 158 (2.5%) had been evaluated on the basis of their AI/PAI scores. *Id.* We know that in some cases an applicants' AI score is high enough that the applicant is granted admission based on that score alone. But we do not have data to show how many of these 58 African–American and 158 Hispanic students were admitted automatically based on their AI scores, which are race-neutral, and how many were admitted after factoring in the students' PAI scores, which use the University's *Grutter*-like holistic evaluation plan and include consideration of an applicant's race as one of seven "special circumstances." Nonetheless, assuming that *all* 58 and 158 African–American and Hispanic students, respectively, were admitted on the basis of their combined AI and PAI scores (i.e., that none of these minority students gained admission on the basis of their race-neutral Academic Index score alone), the question is whether the University's use of race, which is a "highly suspect tool," *Croson*, 488 U.S. at 493, 109 S.Ct. 706, as part of the PAI score contributes a statistically significant enough number of minority students to affect critical mass at the University of Texas.

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20. In this section, I often refer to a raw number followed by a percentage listed in parentheses. *E.g.*, "305 (4.8%)." This percentage figure (__%) is calculated by dividing number of students cited by 6,322, the number of enrolled Texas residents in the 2008 freshman class.

We do not know, because the University does not maintain data, the degree to which race influenced the University's admissions decisions for any of these enrolled students or how many of these students would not have been admitted but-for the use of race as a plus factor. But assuming the University gave race decisive weight in each of these 58 African–American and 158 Hispanic students' admissions decisions, those students would still only constitute 0.92% and 2.5%, respectively, of the entire 6,322–person enrolling in-state freshman class. And this is assuming a 100%, unconstitutional use of race, not as a plus factor, but as a categorical condition for guaranteed admission. *See Grutter*, 539 U.S. at 329–30, 123 S.Ct. 2325 (making race an automatic factor in admissions would "amount to outright racial balancing, which is patently unconstitutional.").

Assume further, that such a prohibited use of race was employed in only half of the University's admissions decisions. This would still only yield 29 (0.46%) African–American and 79 (1.25%) Hispanic students.

Now assume that the University's use of race is truly holistic; that given the multitude of other race-neutral variables the University considers and values sincerely, race's significance is limited in any individual application packet. *See Fisher*, 645 F.Supp.2d at 608 ("UT considers race in its admissions process as a factor of a factor of a factor of a factor. As described in exhaustive detail above, race is one of seven 'special circumstances,' which is in turn one of six factors that make up an applicants personal achievement score."). Lastly, assume that in this system,

the University's use of race results in a but-for offer of admission in one-quarter of the decisions. A twenty-five percent but-for admissions rate seems highly improbable if race is truly limited in its holistic weighting, but the unlikelihood of the assumption proves my point. Even under such a system, the University's proper use of race holistically would only yield 15 (0.24%) African–American and 40 (0.62%) Hispanic students. African–American students, for example, admitted and enrolled by way of this holistic system would still only constitute *two-tenths of one percent* of the University of Texas's 2008 entering freshman class. Such a use of race could have no discernable impact on the classroom-level "educational benefits diversity is designed to produce" or otherwise influence "critical mass" at the University of Texas generally. Such a plan exacts a cost disproportionate to its benefit and is not narrowly tailored. This is especially so on a university campus with, for example, 4,448 classes (out of 5,631) with zero or one African–American students, and 1,689 classes with zero or one Hispanic students. *Fisher*, 645 F.Supp.2d at 607.

More importantly, if the figures above are reasonably accurate, the University's use of race also fails *Grutter*'s compelling interest test as a factual matter. *See* 539 U.S. at 333, 123 S.Ct. 2325 ("[D]iminishing the force of [racial] stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students."). From its inception immediately following *Grutter*, the University's race-conscious admissions policy was described as essential to the University of Texas's educational mission:

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> [T]o accomplish [UT's] mission and fulfill its flagship role ... the undergraduate experience for each student must include *classroom* contact with peers of differing racial, ethnic, and cultural backgrounds. The proposal to consider race in the admissions process is not an exercise in racial balancing but an acknowledgment that significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population prevent the University from fully achieving its mission.

Fisher, 645 F.Supp.2d at 602 (citing Proposal to Consider Race and Ethnicity in Admissions, June 25, 2004 at 24). If the University's use of race is truly necessary to accomplish its educational function, then as a factual matter, the University of Texas's race-conscious measures have been completely ineffectual in accomplishing its claimed compelling interest.

In contrast, Top Ten Percent was responsible for contributing 305 and 1,164 African–American and Hispanic students, respectively, to the entering 2008 freshman class using entirely race-neutral means. These students represent 4.8% and 18.4% of the entering in-state freshman class. In addition, of the 58 African–American and 158 Hispanic enrolled students evaluated on the basis of their AI and PAI scores, if the University's use of race was truly holistic, the percentage of these students for whom race was a decisive factor (i.e., but-for admits) should be minimal. In other words, the vast

majority of these 58 and 158 students were admitted based on objective factors other than race. That is, the University was able to obtain approximately 96% of the African–American and Hispanic students enrolled in the 2008 entering in-state freshman class using race-neutral means. And although the University argues that this number still does not qualify as critical mass, one thing is certain: the University of Texas's use of race has had an infinitesimal impact on critical mass in the student body as a whole. As such, the University's use of race can be neither compelling nor narrowly tailored.

I do not envy the admissions officials at the University of Texas. In 1997, in response to our decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.1996), the people of the State of Texas determined, through their elected representatives, that something needed to be done to improve minority enrollment at Texas's public institutions of higher education. Texas's Top Ten Percent law was intended to effectuate that desire. We take no position today on the constitutionality of that law.[21] Instead, we

21. In assessing whether the University's use of race is narrowly tailored, today's majority opinion finds that Top Ten Percent is not a race-neutral alternative that serves the University's asserted interest "about as well" as its *Grutter*-like plan. *See ante* at 238–42. My concurrence should not be read to approve or reject the constitutionality of percentage plans like Top Ten Percent. That issue remains open. I write separately to underscore the minimal effect that the University's use of race has had on critical mass *in light of Top Ten Percent*, and why the University's use of race would not, therefore, be narrowly tailored applying traditional strict scrutiny principles before *Grutter*. I recognize that *Grutter* appears to swallow this concern.

are asked to scrutinize the legality of the University's race-conscious policy designed to complement Top Ten Percent. Even with the limited data available, I cannot find that the University of Texas's use of race is narrowly tailored where the University's highly suspect use of race provides no discernable educational impact. In my view, the University's program fails strict scrutiny before or after *Grutter*. *See, e.g., Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 790, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) (Kennedy, J., concurring) ("[I]ndividual racial classifications employed in this manner may be considered legitimate *only if they are a last resort* to achieve a compelling interest.") (citation omitted) (emphasis added). Before *Grutter*, it is unlikely that the Supreme Court would have found that the University of Texas's means were narrowly tailored to the interest it asserts. Nonetheless, narrow tailoring in the university admissions context is not about balancing constitutional costs and benefits any longer. Post-*Grutter*, universities need not inflict the least harm possible so long as they operate in good faith. And in assessing good faith, institutions like the University of Texas need not even provide the type of metrics that allow courts to review their affirmative action programs. As long as these public institutions remain sufficiently opaque in their use of race, reviewing courts like ours will be hard pressed to find anything short of good faith and narrow tailoring. In the world post-*Grutter*, courts are enjoined to take universities at their word.

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III

The Supreme Court's narrow tailoring jurisprudence has been reliably tethered, at least before 2003, to the principle that whenever the government divides citizens by race, which is itself an evil that can only be justified in the most compelling circumstances, that the means chosen will inflict the least harm possible, *see Bakke*, 438 U.S. at 308, 98 S.Ct. 2733 (opinion of Powell, J.), and fit the compelling goal "so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson*, 488 U.S. at 493, 109 S.Ct. 706; *see also Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000) ("[W]hen a State discriminates on the basis of race ..., we require a tighter fit between the discriminatory means and the legitimate ends they serve."). *Grutter* abandoned this principle and substituted in its place an amorphous, untestable, and above all, hopelessly deferential standard that ensures that race-based preferences in university admissions will avoid meaningful judicial review for the next several decades.

My disagreement with *Grutter* is more fundamental, however. *Grutter*'s failing, in my view, is not only that it approved an affirmative action plan incapable of strict scrutiny, but more importantly, that it approved the use of race in university admissions as a compelling state interest at all.

The idea of dividing people along racial lines is artificial and antiquated. Human beings are not divisible

biologically into any set number of races.[22] A world war was fought over such principles. Each individual is unique. And yet, in 2010, governmental decisionmakers are still fixated on dividing people into white, black, Hispanic, and other arbitrary subdivisions. The University of Texas, for instance, segregates student admissions data along five racial classes. *See, e.g., 2008 Top Ten Percent Report* at 6 (reporting admissions data for White, Native–American, African–American, Asian–American, and Hispanic students). That is not how society looks any more, if it ever did.

When government divides citizens by race, matters are different.[23] Government-sponsored discrimination is repugnant to the notion of human equality and is more than the Constitution can bear. *See Grutter,* 539 U.S. at 388, 123 S.Ct. 2325 (Kennedy, J., dissenting) ("Preferment

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22. *See* Alexander & Schwarzschild, 21 CONST. COMMENT. at 6 & n.10 ("There is broad scholarly support for this proposition. *See, e.g.*, NAOMI ZACK, PHILOSOPHY OF SCIENCE AND RACE 58–62 (2002); JOSEPH L. GRAVES, JR., THE EMPEROR'S NEW CLOTHES: BIOLOGICAL THEORIES OF RACE AT THE MILLENNIUM (2001); Joshua M. Glasgow, *On the New Biology of Race,* 100 J. PHIL. 456 (2003).").

23. *See* Alexander & Schwarzschild, 21 CONST. COMMENT. at 6–7 ("[W]hen the government classifies people racially and ethnically, and then makes valuable entitlements such as admission to a university turn on those classifications, ... that very fact encourages people to think that 'races' are real categories, not bogus ones, and that one's race is an exceedingly important rather than a superficial fact about oneself and others. In other words, it encourages people to pay close attention to race and to think in racial terms.").

by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and the idea of equality."). There are no *de minimis* violations of the Equal Protection Clause, and when government undertakes any level of race-based social engineering, the costs are enormous. Not only are race-based policies inherently divisive, they reinforce stereotypes that groups of people, because of their race, gender, or ethnicity, think alike or have common life experiences. The Court has condemned such class-based presumptions repeatedly. *See, e.g., United States v. Virginia*, 518 U.S. 515, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) ("Supposed 'inherent differences' are no longer accepted as a ground for race or national origin classifications."); *Shaw*, 509 U.S. at 647, 113 S.Ct. 2816 (rejecting the notion "that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same ... interests," or have a common viewpoint about significant issues); *Wygant*, 476 U.S. at 316, 106 S.Ct. 1842 (Stevens, J., dissenting) (the "premise that differences in race, or the color of a person's skin, reflect real differences ... is utterly irrational and repugnant to the principles of a free and democratic society"). I do not see how racial discrimination in university admissions is any less repugnant to the Constitution. If anything, government-sponsored discrimination in this context presents an even greater threat of long-term harm.[24]

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24. Professor Cohen succinctly describes some of the effects of racial and ethnic preferences in higher education:

1. preference divides the society in which it is awarded;

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For the most part, college admissions is a zero-sum game. Whenever one student wins, another loses. The entire competition, encouraged from age five on, is premised on *individual* achievement and promise.[25] It is no

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2. it establishes a precedent in excusing admitted racial discrimination to achieve political objectives;

3. it corrupts the universities in which it is practiced, sacrificing intellectual values and creating pressures to discriminate by race in grading and graduation;

4. ...

5. it obscures the real social problem of why so many minority students are not competitive academically;

6. it obliges a choice of some few ethnic groups, which are to be favored above all others;

7. ...

8. it removes incentives for academic excellence and encourages separatism among racial and ethnic minorities;

9. it mismatches students and institutions, increasing the likelihood of failure for many minority students; and

10. it injures race relations over the long haul.

CARL COHEN & JAMES P. STERBA, AFFIRMATIVE ACTION & RACIAL PREFERENCE 109 (2003).

25. For example, in the School of Architecture, the School of Fine Arts, and certain honors programs, where aptitude is essential, the University requires special portfolio, audition, and

exaggeration to say that the college application is 18 years in the making and is an unusually personal experience: the application presents a student's best self in the hopes that her sustained hard work and experience to date will be rewarded with admission. Race-based preferences break faith with this expectation by favoring a handful of students based on a trait beyond the control of all. *See Bakke*, 438 U.S. at 361, 98 S.Ct. 2733 (opinion of Brennan, White, Marshall & Blackmun, JJ.) ("[A]dvancement sanctioned, sponsored, or approved by the State should ideally be based on individual merit or achievement, or at least on factors within the control of the individual ...."). Given the highly personal nature of the college admissions process, this kind of class-based discrimination poses an especially acute threat of resentment and its corollary—entitlement. More fundamentally, it "assures that race will always be relevant in American life, and that the ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race will never be achieved." *Croson*, 488 U.S. at 495, 109 S.Ct. 706 (citation and internal quotation marks omitted).

Yesterday's racial discrimination was based on racial preference; today's racial preference results in racial discrimination. Changing the color of the group discriminated against simply inverts, but does address, the fundamental problem: the Constitution prohibits all

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other requirements. *See ante* at 229 n. 87. In these and other impacted programs where student demand outstrips available space, the University recognizes and uses merit as the decisive consideration in admission. I do not see why excellence and merit warrant less consideration in the University's other disciplines.

forms of government-sponsored racial discrimination. *Grutter* puts the Supreme Court's imprimatur on such ruinous behavior and ensures that race will continue to be a divisive facet of American life for at least the next two generations. Like the plaintiffs and countless other college applicants denied admission based, in part, on government-sponsored racial discrimination, I await the Court's return to constitutional first principles.

APPENDIX F — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, DATED AUGUST 17, 2009

United States District Court,
W.D. Texas,
Austin Division.

645 F.Supp.2d 587, 250 Ed. Law Rep. 298

No. A-08-CA-263-SS.
Aug. 17, 2009

Abigail Noel FISHER and
Rachel Multer Michalewicz,

Plaintiffs,

v.

UNIVERSITY OF TEXAS AT AUSTIN, et al.,

Defendants.

ORDER

SAM SPARKS, District Judge.

BE IT REMEMBERED on June 12, 2009 the Court called the above-styled cause for a hearing on all pending matters, the parties appeared through counsel, and the Court addressed Plaintiffs' Motion for Partial Summary Judgment [# 94], Defendants' Cross-Motion for

Summary Judgment [# 96], Plaintiffs' Combined Reply Memorandum in Support of Motion for Partial Summary Judgment and Memorandum in Opposition to Defendants' Cross-Motion for Partial Summary Judgment ("Plaintiffs' Reply and Resp.") [# 98, 99], Defendants' Reply memorandum in Support of Cross-Motion for Summary Judgment [# 102], *Amicus Curiae* Lawrence Longoria, Jr., Nathan Bunch, and Texas League of United Latin American Citizens' (hereinafter collectively referred to as "LULAC") Motion for Leave to File *Amicus Curiae* Brief In Support of Defendants Out of Time [# 104], and Plaintiffs' Response to LULAC's Motion for Leave [# 107]. Plaintiffs do not object to LULAC's participation as *amici*, thus LULAC's Motion for Leave to File *Amicus Curiae* Brief In Support of Defendants Out of Time [# 104] is GRANTED; however, Plaintiffs' objection to the new evidence submitted in support of LULAC's brief is well taken. The Court will sustain the objection and thus consider only LULAC's legal arguments and arguments based on the properly-submitted evidence in this case, and will not consider the new evidence submitted by LULAC. Also filed in relation to the cross motions for summary judgment and considered by the Court are LULAC's *Amicus Curiae* Brief in Support of Defendants [# 104] and *Amicus Curiae* NAACP Legal Defense & Educational Fund, Inc., The Black Student Alliance at the University of Texas at Austin, Chad Stanton, Anthony Williams, Ariel Barrett, C.J. Davis, Devon Robinson, Trenton Stanton, and Eric Stanton's (hereinafter collectively referred to as "NAACP") *Amicus Curiae* Memorandum in Support of Defendants' Cross-Motion for Summary Judgment and In Opposition to Plaintiffs' Motion for Partial Summary

Judgment [# 103]. After considering the motions, the responses, the replies, the *amicus* briefs, the relevant law, and the case file as a whole, the Court enters the following opinion and orders.

BACKGROUND

I. Procedural History

On April 7, 2008, Plaintiff Abigail Fisher filed suit in the Western District of Texas. On April 17, 2008, Ms. Fisher was joined in her suit by Rachel Michalewicz. Plaintiff Fisher is a Caucasian female who attended Stephen F. Austin High School in Sugar Land, Texas. Plaintiff Michalewicz is a Caucasian female who attended Jack C. Hays High School in Buda, Texas. Plaintiffs both applied for admission to the University of Texas at Austin ("UT" or the "University") in the fall of 2008. Both were rejected.[1] Plaintiffs sued multiple defendants: the State of Texas; UT; Mark G. Yudof, Chancellor of the University of Texas System in his official capacity; David B. Pryor, Executive Vice Chancellor for Academic Affairs in his official capacity; Barry D. Burgdorf, Vice Chancellor and General Counsel in his official capacity; William Powers, Jr., President of the University of Texas at Austin in his official capacity; the Board of Regents of the Texas State University System; John W. Barnhill, Jr., H. Scott Caven, Jr., James R. Huffines, Janiece Longoria, Colleen

1. However, as Texas residents both Plaintiffs were offered the opportunity to participate in UT's Coordinated Admission Program ("CAP"), described more fully below.

McHugh, Robert B. Rowling, James D. Dannenbaum, Paul Foster, and Printice L. Gary, as Members of the Board of Regents in their official capacities; and Bruce Walker, Vice Provost and Director of Undergraduate Admissions in his official capacity (collectively "Defendants").[2] Plaintiffs contend the "admissions policies and procedures currently applied by Defendants discriminate against Plaintiffs on the basis of their race in violation of their right to equal protection of the laws under the Fourteenth Amendment of the United States Constitution, U.S. Const. amend. XIV, § 1, and federal civil rights statutes, 42 U.S.C. §§ 1981, 1983, and 2000d *et seq.*" Pls.' Am. Compl. [# 30] ¶ 2. Plaintiffs seek declaratory and injunctive relief, including evaluation of Plaintiffs' applications for admission under race-neutral criteria, and attorneys' fees and costs.

Following the Court's denial of Plaintiffs' motion for preliminary injunction, the parties agreed to a scheduling order bifurcating the trial into two phases: liability and remedy. The Court permitted two groups, LULAC and NAACP, to submit *amici* briefs in lieu of intervention. On June 12, 2009, the Court held a hearing on the parties' motions for summary judgment regarding liability, specifically on the issue of whether UT's admissions policies and practices violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

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2. Plaintiffs subsequently voluntarily dismissed Defendants the State of Texas and Burgdorf, and substituted Kenneth Shine for Mark Yudof.

Appendix F

II. History of Undergraduate Admissions at the University of Texas at Austin

The University of Texas at Austin ("UT") is a public education institution authorized by Article VII § 10 of the Texas Constitution and funded by the governments of Texas and the United States. Pls.' Second Am. Compl. [# 85] ¶ 18. It is a highly selective university, receiving applications from approximately four times more students each year than it can enroll in its freshman class. Defs.' Cross-Mot. for Summ. J. Statement of Facts ¶ 2. For the entering class of 2008, to which Plaintiffs sought admission, 29,501 students applied to UT. Less than half, 12,843, were admitted and 6,715 ultimately enrolled. Defs.' Cross-Mot. for Summ. J. Tab 8, Aff. of Gary M. Lavergne ("Lavergne Aff.") Ex. C, *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin*, October 28, 2008 at 6 (Table 1) ("*2008 Top Ten Report*"). As the flagship university of Texas, UT describes its admissions goal as enrolling a meritorious and diverse student body with the expectation that many of its graduates will become state and national leaders. Defs.' Cross-Mot. for Summ. J. Tab 11, Affidavit of N. Bruce Walker ("Walker Aff.") Ex. A, *Proposal to Consider Race and Ethnicity in Admissions*, June 25, 2004 at 24-25 ("*2004 Proposal*"); Defs.' Cross-Mot. for Summ. J. Tab 5, Dep. of N. Bruce Walker ("Walker Dep.") at 9:10-12. To accomplish this, the University continuously develops internal procedures to supplement the judicial and legislative mandates governing its admissions process. Defs.' Cross-Mot. for Summ. J. Tab 2, Dep. of Kendra Ishop ("Ishop Dep.") at 9:13-18. The complex

system currently in use at UT and challenged by the Plaintiffs is the product of these shifting internal and external policies. *Id.* In order to provide context to the current system, the Court will briefly review the changes in UT's admissions process from 1995 to today.

a. UT Admissions Pre- and Post-*Hopwood v. Texas*

Until 1996, UT admitted students based on a two-tiered affirmative action system. Pls.' Mot. for Part. Summ. J. Mem. at 3. The first element, still in use today, is known as a the Academic Index ("AI"), and is a computation of each applicant's predicted freshman grade point average ("PGPA") based on the student's high school class rank and standardized test scores (SAT or ACT). *Id.* The second element considered prior to the Fifth Circuit's decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.1996), was the applicant's race, as UT believed exclusive reliance on PGPA would yield a class with "unacceptably low diversity levels." Lavergne Aff. Ex. A, *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at The University of Texas at Austin*, December 2006 (revised December 2007) at 2 ("*2006 Top Ten Report*"). As a result of this system, UT's 1996 enrolled freshman class, the last class admitted using this process, included 4.1 percent African-American student enrollment and 14.7 percent Hispanic student enrollment. Pls.' Mot. for Part. Summ. J. Statement of Facts ¶ 13 (citing *2006 Top Ten Report* at 4-5 (Tables 1, 1a)).

The Fifth Circuit terminated this system with its decision in *Hopwood v. Texas*, holding unconstitutional

the use of race-based criteria in admissions decisions at The University of Texas School of Law. 78 F.3d at 957. The Court concluded diversity in education does not constitute a compelling governmental interest, a conclusion the Texas Attorney General interpreted as prohibiting the use of race as a factor in admissions by any undergraduate or graduate program at Texas state universities, including UT. *Hopwood* at 944; Tex. Att'y Gen. Ltr. Op. No. 97-001 at 18. Consequently, beginning with the 1997 admissions cycle UT eliminated its affirmative action program. *2008 Top Ten Report* at 4. Although the University retained its use of the AI, it replaced consideration of race with a Personal Achievement Index ("PAI"). Defs.' Cross-Mot. for Summ. J. Statement of Facts ¶¶ 86-87. The PAI was determined by a holistic review of applications intended to identify and reward students whose merit as applicants was not adequately reflected by their class rank and test scores. *Id.* at ¶ 86; Walker Dep. at 31:7-9.

Although this AI/PAI system was facially race-neutral in accordance with *Hopwood*, it was also partially designed to increase minority enrollment. Walker Dep. at 31:10-12. Many of the special circumstances considered in computing applicants' PAIs disproportionately affect minority candidates, including the socio-economic status of the student's family, languages other than English spoken at home, and whether the student lives in a single-parent household. Pls.' Mot. for Part. Summ. J. Mem. at 3. Despite these measures, minority enrollment at the University decreased immediately following *Hopwood*. In 1997, the first year during which admissions were conducted under the post-*Hopwood* system, African-

Americans accounted for 2.7 percent and Hispanics for 12.6 percent of the entering freshman class, compared to 4.1 percent and 14.5 percent respectively the previous year under the pre-*Hopwood* system. Pls.' Mot. for Part. Summ. J. Statement of Facts ¶ 79 (citing *2006 Top 10 Report* at 4-5 (Tables 1, 1a)).

b. Internal Initiatives and the Top Ten Percent Law

In order to counter these decreases in minority enrollment, both UT and the Texas State Legislature adopted additional race-neutral[3] initiatives that, along with the AI/PAI system, are still in use by the University. Defs.' Cross-Mot. for Summ. J. Tab 9, Affidavit of Michael K. Orr ("Orr Aff.") ¶ 3. UT instituted several scholarship programs intended to increase the diversity yield from acceptance to enrollment, expanded the quality and quantity of its outreach efforts to high schools in underrepresented areas of the state, and focused additional attention and resources on recruitment in low-performing schools. *Id.* ¶ 4. Although the University believes these initiatives had the residual effect of improving diversity, no specific increases can be directly attributed to them and the University does not keep track of their effects on minority representation. Defs.' Cross-Mot. for Summ. J. Tab 4, Dep. of Michael K. Orr ("Orr Dep.") at 20:3-12.

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3. "Race-neutral" may be a misnomer. As the parties appear to agree, many of these initiatives as well as HB 588 are intended to increase minority enrollment and thus, in reality, are "race-conscious." But *facially* these policies are race-neutral, and thus the Court will continue to use that phrase to describe policies which do not explicitly favor one racial group over another.

Appendix F

The Texas State Legislature responded to *Hopwood* by passing House Bill 588, codified as TEX. EDUC. CODE § 51.803 (1997) and also known as HB 588 or the "Top Ten Percent law," a year after the Fifth Circuit issued its decision. Pls.' Mot. For Part. Summ. J. at 3-4. HB 588, which is still in effect, granted automatic admission to any public state university, including UT, for all public high school seniors in the top ten percent of their class at the time of their application, as well as the top ten percent of high school seniors attending private schools that make their student rankings available to university admissions officers.[4] TEX. EDUC. CODE § 51.803(a); Pls.' Mot. for Part. Summ. J. Statement of Facts ¶¶ 59-60.

The purpose of the Top Ten Percent law was to "ensure a highly qualified pool of students each year in the state's higher educational system" while promoting diversity among the applicant pool so "that a large well qualified pool of minority students [is] admitted to Texas universities." HB 588, House Research Organization Digest (1997) at 4-5. Though facially neutral, one of the purposes of HB 588 was to increase minority representation at UT. Defs.' Opp. to Pls.' Mot. for Prelim. Inj. at 19-20. Under HB 588, and in conjunction with the AI/PAI system and other facially race neutral initiatives instituted by UT, post-*Hopwood* minority enrollment levels have improved. *2006 Top 10 Report* at 4-5 (Tables

4. HB 588 has recently been amended, limiting the number of freshmen UT must admit under the Top Ten Percent law to 75 percent of its overall freshman class. But this change was not in effect during the relevant time period in which the Plaintiffs applied to UT.

1, 1a). The entering freshman class of 2004, the last admitted under this race-neutral system, was 4.5 percent African-American and 16.9 percent Hispanic, compared to 2.7 percent and 12.6 percent respectively seven years earlier when *Hopwood* first went into effect. Pls.' Mot. for Part. Summ. J. Statement of Facts ¶ 79 (citing *2006 Top Ten Report* at 4-5 (Tables 1, 1a)). Seventy-five percent of all admitted African-American students and seventy-six percent of all admitted Hispanic students in 2004 qualified under the Top Ten Percent law, compared to fifty-six percent of all admitted Caucasian students. *2008 Top Ten Report* at Table 2.

c. UT Admissions *Post-Grutter v. Bollinger* (the Current Admissions System)

Hopwood's prohibition on the consideration of race in admissions ended after the 2004 admissions cycle as a result of the United States Supreme Court's landmark decision in *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003). The Supreme Court held that universities have a compelling governmental interest "in obtaining the educational benefits that flow from a diverse student body." *Grutter*, 539 U.S. at 343, 123 S.Ct. 2325. In order to improve classroom discussion, develop the next generation of leaders, and break down racial stereotypes, the Supreme Court decided universities may consider race as a "plus" in evaluating an applicant's file in order to enroll a "critical mass" of minority students, described as "a number that encourages underrepresented minority students to participate in the classroom and not

feel isolated ... or like spokespersons for their race." *Id.* at 318-19, 330-34, 123 S.Ct. 2325.

To conform with the *Grutter* decision, UT again modified its admissions policies. On August 6, 2003, the University of Texas Board of Regents passed a resolution authorizing each UT System school to decide "whether to consider an applicant's race and ethnicity as part of the [institution's] admission" policies, which must include "individualized and holistic review of applicant files in which race and ethnicity are among a broader array of qualifications and characteristics considered," as well as periodic reviews to evaluate the efficacy and necessity of considering applicants' race. Pls.' Mot. for Part. Summ. J. Ex. 19, Aff. of Francie A. Frederick ("Frederick Aff.") Ex. A at 4-5.

To determine whether such consideration of race was warranted, UT conducted a study in November 2003 that concluded there was not a critical mass of underrepresented minority students enrolled at the University, though it did not establish what number or percentage of minority students would meet that standard. Walker Dep. at 18:15-24; Walker Aff. ¶ 10. In their survey responses, minority students reported feeling isolated and a majority of students at the University stated there was insufficient diversity in the classroom. *Id.* ¶ 12; Walker Dep. at 21:6-13. The study also found that in 2002, 90 percent of classes with 5 to 24 students had one or zero African-American students and 43 percent had one or zero Hispanic students. Walker Aff. ¶ 11; Lavergne Aff.

Ex. B, *Diversity Levels of Undergraduate Classes at the University of Texas at Austin, 1996-2002* at 8 (Table 3) ("*Diversity Study*").[5] Thus, in August 2004, after almost a year of deliberations, the UT System approved a revised admissions policy for UT that included an applicant's race as a special circumstance reviewers may consider in evaluating an applicant's PAI. Walker Aff. ¶ 14; Defs.' Opp. to Pls.' Mot. for Prelim. Inj. at 5.

UT does not have a projected date by which it intends to cease using race as a factor in undergraduate admission decisions. Pls.' Mot. for Part. Summ. J. Mem. at 6. However, as an informal practice UT reviews its admissions procedures each year. Walker Aff. ¶ 16. Furthermore, every five years the admissions process is evaluated specifically to assess whether consideration of race is necessary to the admission and enrollment of a diverse student body, or whether race-neutral alternatives exist that would achieve the same results. *Id.*; *2004 Proposal* at 32. The first formal review of UT's use of race in admissions is scheduled to begin in the fall of 2009. *2004 Proposal* at 32.

As a result of its policies, UT "ranks sixth in the nation in producing undergraduate degrees for minority groups." Walker Dep. at 10:21-24 (quoting *Diverse Issues in Higher Education,* May 31, 2007). From 1998 to 2008, a period

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5. Forty-six percent of classes with between five and twenty-four students had one or zero Asian-American students in 2002. However, UT does not consider Asian-American students to constitute an underrepresented minority at the University. Walker Aff. ¶ 11; *Diversity Study* at 8 (Table 3).

during which the Top Ten Percent law, the AI/PAI system, and race-neutral initiatives governed the University's admissions policies and to which consideration of race was added in 2005, the enrollment of African-American students increased from three to six percent of the entering freshman class and the enrollment of Hispanic students increased from 13 to 20 percent. *2008 Top Ten Report* at Table 2. However, the various programs in place make it difficult to attribute increases in minority enrollment to a specific program or programs. Walker Dep. at 13:13-17, 23:20-24. Furthermore, demographics in the state of Texas have changed substantially in recent years, indicating that increases in minority enrollment may be at least partially attributed to population shifts. Defs.' Opp. to Pls.' Mot. for Prelim. Inj. at 21-22 n. 8. While African-American students accounted for 12.56 percent of Texas high school graduates in 1997 and Hispanic students accounted for 29.78 percent, their populations had increased to account for 13.33 percent and 35.79 percent, respectively, of Texas high school graduates by 2007. Weirich Aff. ¶ 4. Underrepresented minorities are also somewhat more likely to have been admitted to UT under the Top Ten Percent law than their Caucasian peers; in 2008, 85 percent of all admitted Hispanic students and 80 percent of all admitted African-American students qualified for admission under the Top Ten Percent law, compared to 67 percent of all admitted Caucasian students.[6] *2008 Top Ten Report* at Table 2.

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6. Within ethnic groups, enrolling top ten percent students generally report higher PGPAs than non-top ten percent students, though their SAT score averages vary little. Caucasian students in both the top ten percent and the non-top ten percent categories

Appendix F

The system under which Plaintiffs were denied admission to UT is a product of all of the developments discussed above, with its most recent changes based on the affirmative action program used by the University of Michigan School of Law and approved by the United States Supreme Court in *Grutter v. Bollinger*. Defs.' Opp. to Pls.' Mot. for Prelim. Inj. at 15-16. As did the University of Michigan School of Law, UT uses "a holistic, multi-factor, individualized assessment of each applicant" in which race is but one of many factors. *Id.* at 4. However, the two institutions' admissions policies and procedures differ significantly due to UT's legislatively-mandated admission of Top Ten Percent Texas residents, which largely dominates the admissions process. Pls.' Mot. for Part. Summ. J. Mem. at 12. As a result of HB 588, UT operates a two-tiered system of admissions based on the Top Ten Percent law and the AI/PAI system, under which an applicant's race is taken into consideration. *Id.* at 4.

i. Admissions Under HB 588

Before their candidacies are evaluated, all applicants to UT are divided into three pools: Texas residents,

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also report on average higher PGPAs and SAT scores than African-American or Hispanic students. In the entering class of 2007, Caucasian top-ten percent students had an average PGPA of 3.25 and SAT score of 1275, and non-top ten percent students had an average PGPA of 2.95 and SAT score of 1275. African-American top ten percent students had an average PGPA of 2.65 and SAT score of 1078, and non-top ten percent students had an average PGPA of 2.42 and SAT score of 1073. Hispanic top ten percent students had an average PGPA of 2.70 and SAT score of 1115, and non-top ten percent students had an average PGPA of 2.47 and SAT score of 1155.

domestic non-Texas residents and international students. Defs.' Cross-Mot. for Summ. J. Tab 7, Aff. of Kendra B. Ishop ("Ishop Aff.") ¶ 7. Students compete only against other students in their respective pools for admission. *Id.* Texas residents are allotted 90 percent of all available seats, and their admission is based on the Top Ten Percent law, the AI/PAI system, or a combination of both. Defs.' Cross-Mot. for Summ. J. Tab 2, Dep. of Kendra B. Ishop ("Ishop Dep.") at 14:11-15:5; 39:16-17. The remaining ten percent of seats are awarded to domestic non-Texas residents (approximately seven percent in recent years) and international students (approximately three percent in recent years). *Id.* at 40:22-41:6; Pls.' Mot. for Part. Summ. J. at 4. Admission decisions for non-Texas resident applicants are made solely on the basis of their AI and PAI scores. Ishop Aff. ¶ 12.

Texas residents are divided into Top Ten Percent applicants and non-Top Ten Percent applicants. *2008 Top Ten Report* at 2. A significant majority of admitted students qualify for admission due to HB 588. Defs.' Cross-Mot. for Summ. J. Statement of Facts ¶ 15. In 2008, Top Ten Percent applicants accounted for eighty-one percent of the entering class overall, compared to forty-one percent in 1998, and filled ninety-two percent of the seats allotted to Texas residents, leaving only 841 places university-wide in the Fall 2008 class for non-Top Ten Percent Texas residents. *2008 Top 10 Report* at 9 (Table 2b); Ishop Aff. ¶ 16. However, while Texas residents who graduate in the top ten percent of their high school class are guaranteed admission to the University, they are not guaranteed admission to the program of their choice. Defs.' Cross-Mot. for Summ. J. Tab 3, Dep. of Gary M. Lavergne ("Lavergne Dep.") at 15:20-21.

Appendix F

Admission to UT is granted by individual schools or majors. Ishop Aff. ¶ 7. Each applicant identifies their first and second choice programs at the University and competes for admission against other applicants who have identified the same program. *Id.* ¶¶ 7-10. Many colleges and majors provide automatic admission to Top Ten Percent applicants, but two groups impose additional requirements. First, because of special portfolio, audition and other requirements the Top Ten Percent law does not apply to the School of Architecture, the School of Fine Arts, and certain honors programs. Ishop Dep. at 92:6-22. Second, programs known as "impacted majors," including the School of Business, College of Communication, School of Engineering, Kinesiology, and Nursing, are obligated to accept only a certain number of Top Ten Percent applicants. *Id.* at 32:5-17. These programs are "impacted" because they could fill eighty percent or more of their available spaces each year based solely on the preferences of applicants admitted pursuant to the Top Ten Percent law. *Id.* To prevent over-subscription and allow those colleges to admit non-Top Ten Percent applicants, UT caps the percentage of students automatically admitted to these programs at seventy-five percent of the available spaces. *Id.*; Ishop Aff. ¶ 11. Top Ten Percent students who do not receive automatic entry to their first choice program are grouped with other Texas applicants and compete against them for admission to a specific program based on their AI and PAI scores. Defs.' Cross-Mot. for Summ. J. Statement of Facts ¶ 27.

ii. Admissions Under the Academic Index/ Personal Achievement Indices

The AI/PAI system is used to make admission decisions as to all of the Top Ten Percent applicants who are denied automatic admission to the program of their choice, the non-Top Ten Percent Texas resident applicants, the domestic non-Texas resident applicants, and the international applicants. Ishop Aff. ¶ 12. Throughout the process, they remain separated in three pools: Texas residents, domestic non-Texas residents, and international applicants. Ishop Aff. ¶ 7. The current AI/PAI system has been in continuous use since 1997; its only substantive change was UT's decision after *Grutter* to authorize consideration of race in determining an applicant's PAI. Walker Dep. at 30:23-31:1; *2008 Top Ten Report* at 4. AI/PAI contains two elements: the Academic Index and the Personal Achievement Index.

First, the Academic Index predicts an applicant's freshman GPA in the program to which she has applied. Defs.' Cross-Mot. for Summ. J. Statement of Facts ¶ 25. The AI is computed using a multiple regression equation that contains four elements: (1) an applicant's high school class rank; (2) completion of UT's required high school curriculum; (3) the extent to which the applicant exceeded the required curriculum; and, (4) SAT (verbal and math) or ACT scores. *2008 Top Ten Report* at 2. The equation varies by school, as different programs accord different relative weight to each variable, such as the applicant's math versus her critical reading standardized test scores. Lavergne Dep. at 18:5-18. The equation generates a

number ranging from 0.0 to 4.1, with the additional 0.1 points awarded if the applicant has exceeded the required high school curriculum. *Id.* at 17:13-25. Students who take the SAT or ACT more than once receive the benefit of the higher score. *2008 Top 10 Report* at 5 n. 5. Some applicants' AI scores are high enough that the applicant is granted admission based on that score alone. Ishop Aff. ¶ 12. Others are low enough that their applications are considered presumptively denied. *Id.* Known as group "C", applicants whose applications are presumptively denied based on their AI score have their file reviewed by senior admission staff readers who either award a default PAI score of 3-3-3 to the application or determine the file warrants a full review before any PAI scores are assigned. *Id.*

Second, the Personal Achievement Index accounts for all remaining parts of the applicant's file. Ishop Aff. ¶ 4. The index is based on an equation containing three scores: one score for each of the two required essays and a third score, called the personal achievement score, representing a holistic evaluation of the applicant's entire file. Defs.' Cross-Mot. for Summ. J. Statement of Facts ¶¶ 29, 49. Each element receives a score from 1 to 6 and is inserted into the PAI equation, which gives slightly greater weight to the personal achievement score than to the mean of the two essays.[7] Lavergne Dep. at 57:14-17, 21:23.

Each of the two essay scores is the result of a holistic evaluation of the essay as a piece of writing based on its

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7. PAI = [(personal achievement score * 4) + (average essay score * 3)] / 7. Lavergne Dep. 57:41-17.

complexity of thought, substantiality of development, and facility with language. Defs.' Cross-Mot. for Summ. J. Tab 1, Dep. of Brian Bremen ("Bremen Dep.") at 10:19-21. The majority of essays are written on the two basic topics provided by the University, though some programs require applicants to base their essays on different, program-specific topics. Ishop Dep. at 12:17-19. The scores are awarded by a member of the UT admissions office staff who relies on annual training, a scoring guide, and a set of samples, all of which are provided each year by a UT faculty member who is a nationally recognized expert in holistic scoring. Bremen Dep. at 10:1-12, 18-21, 31:9; Ishop Aff. ¶ 13. Additionally, senior staff members perform quality control, verifying that awarded scores are in line with those they would give. Bremen Dep. at 13:14-20. The most recent study, conducted in 2005, found that essay readers scored within one point of one another 91 percent of the time and holistic file readers scored within one point of one another 88 percent of the time, reflecting significant consistency. Lavergne Aff. ¶ 8.

The third PAI element is the personal achievement score, which is based on an evaluation of the file in its entirety by senior members of the admissions staff. Bremen Dep. at 14:10-15:6. The evaluators conduct a holistic review considering the applicant's demonstrated leadership qualities, extracurricular activities, awards and honors, work experience, service to the school or community, and special circumstances. *2008 Top Ten Report* at 2. The relevant special circumstances include the applicant's family's socio-economic status, her school's socio-economic status, her family responsibilities, whether she lives in a single-parent home, whether languages

other than English are spoken at home, her SAT/ACT score compared to her school's average score and, as of 2005, her race. *Id.* The essays are re-read during this process, but only for consideration of the information they convey, rather than to assess the quality of the student's writing. Bremen Dep. at 17:5-13. Students may also choose to submit a resume, supplemental essays, or any additional information such as artwork and portfolios for consideration during this process. Ishop Dep. at 12:19-13:5. None of the elements are considered individually, or given a numerical value and then added together; instead, the file is evaluated in its entirety in order to provide a better understanding of the student as a person and place her achievements in context. Bremen Dep. at 22:8-13; Ishop Dep. at 13:9-14:19.

Because an applicant's race is identified at the front of the admissions file, reviewers are aware of it throughout the evaluation. Ishop Dep. at 19:20-24. Race in and of itself does not affect the score but is instead used to place the student's achievements into context and reveal whether she possesses a valuable "sense of cultural awareness." Bremen Dep. at 30:25, 41:5-7. Used in this manner, it can positively impact applicants of all races, including Caucasian, or may have no impact whatsoever. Ishop Dep. at 57:2-58:12. Given these guidelines and the fact race, like all the other elements, is never awarded a numerical value or considered alone, it is difficult to evaluate which applicants have been positively or negatively affected by its consideration or which applicants were ultimately offered admission due to their race who would not have otherwise been offered admission. Ishop Dep. at 19:20-

20:3, 23:10-14. Yet, even though race is not determinative, it is undisputedly a meaningful factor that can make a difference in the evaluation of a student's application. Pls.' Mot. for Part. Summ. J. Mem. at 5; Pls.' Mot. for Part. Summ. J. Ex. 8, Dep. of Bruce Walker ("Walker Dep.") at 45:5-12. Although a candidate's race is known throughout the application process, no admissions office employee or anyone else at UT monitors the racial or ethnic composition of the entire group of admitted students in order to decide whether a particular applicant will be admitted. Ishop Aff. ¶ 17.

Once AI and PAI scores have been awarded, the data is entered in matrices created for each major or school, depending on whether the program to which the student applied admits students to the college or into a specific major. Ishop Aff. ¶ 14. The matrix is set up as a graph, with the vertical left axis representing an applicant's PAI score and the horizontal bottom axis representing an applicant's AI score. *Id.* Applicants are identified only by their AI/PAI numbers, with the upper left corner containing the highest combined scores and the lower right corner containing the lowest combined scores. *2008 Top 10 Report* at 3 (Figure 1). Each cell on the matrix contains a number representing the total number of applicants who share that particular combination of AI and PAI scores. Defs.' Cross-Mot. for Summ. J. Statement of Facts ¶ 66.

Once all applicants have been placed within the appropriate matrix cell, a liaison for the school or major establishes a cut-off line. Ishop Dep. at 38:6-8. The line is drawn in a "stair step" manner and UT offers admission

to applicants whose AI and PAI scores place them in cells located to the left of the line. Defs.' Cross-Mot. for Summ. J. Statement of Facts ¶ 70. Placement of the cutoff line depends on the combination of AI/PAI scores desired by the school and the number of available slots. Ishop Dep. at 47:10-24.

Applicants denied admission to their first choice program under this process are then "cascaded" down to the matrix of their second choice. Defs.' Cross-Mot. for Summ. J. Statement of Facts ¶¶ 69-70. The influx of new applicants changes the matrices' composition, and the cut-off lines are accordingly re-adjusted to accommodate this shift. Ishop Aff. ¶ 14. After all applicants have been considered for their second choice program, Top Ten Percent applicants who have not been admitted to either their first or second choice programs are automatically admitted as Liberal Arts Undeclared majors. *Id.* All remaining applicants are cascaded into the Liberal Arts Undeclared matrix, where they compete for the remaining seats using the same procedure discussed above. Defs.' Cross-Mot. for Summ. J. Statement of Facts ¶ 75. Any non-Texas residents and international applicants who fail to gain admission into Liberal Arts Undeclared are denied admission to UT. Ishop Dep. at 47:2-5.

iii. The Summer and Coordinated Admission Programs

Texas residents, however, are never denied admission to UT if they submit a complete entering freshman application by the published deadlines. *2008 Top Ten*

Report at 3. If not admitted to the entering fall class, a Texas resident is offered admission to either the summer program or the Coordinated Admission Program ("CAP"). *Id.* The summer program allows students to begin their studies at UT during the summer, joining the regularly admitted students in the fall. Ishop Aff. ¶ 15. Approximately eight hundred students are enrolled in that program each year. Ishop Dep. at 47:10-24. CAP entitles its participants to automatically transfer to UT if they meet certain conditions, including the completion of thirty credit hours with a cumulative GPA of 3.2 or higher at a participating UT System campus during their freshman year. Ishop Aff. ¶ 15.

Applicants located in AI/PAI cells on the Liberal Arts Undeclared matrix near those selected for admission to the fall class are considered for admission to the summer class, while all other applicants are automatically admitted into CAP. Ishop Aff. ¶ 15. The potential summer students' files are re-read in their entirety. *Id.* Although senior staff members conducting the review are aware of the scores originally awarded to each applicant's file, they are not bound by them and do not recalculate a new score, but rather make the summer admissions decision based on the file as a whole. Ishop Dep. at 27:10-22. Admission to the summer program is offered solely based on this individualized, holistic review. *Id.* at 29:10-14. Although it is relatively rare, reviewers may still at this late stage admit an applicant to the entering fall class. *Id.* at 49:5-50:12. Furthermore, although the readers conducting this review, like all admission office staffers, have access to a head count of admitted students by race, they do not

take such information into account as part of the review process. Ishop Aff. ¶ 15. All Texas residents not offered admission to the summer class through this process are then accepted to CAP, ending the admissions process at UT for that cycle. *Id.* ¶ 14.

ANALYSIS

I. Standard

Summary judgment may be granted if the moving party shows there is no genuine issue of material fact, and it is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In deciding summary judgment, the Court construes all facts and inferences in the light most favorable to the nonmoving party. *Richter v. Merchs. Fast Motor Lines, Inc.*, 83 F.3d 96, 98 (5th Cir.1996). The standard for determining whether to grant summary judgment "is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the nonmoving party based upon the record evidence before the court." *James v. Sadler*, 909 F.2d 834, 837 (5th Cir.1990).

Both parties bear burdens of production in the summary judgment process. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). First, the moving party has the initial burden of showing there is no genuine issue of any material fact and judgment should be entered as a matter of law. FED.R.CIV.P. 56(c); *Celotex*, 477 U.S. at 322-23, 106 S.Ct. 2548; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The nonmoving party must

then come forward with competent evidentiary materials establishing a genuine fact issue for trial and may not rest upon the mere allegations or denials of its pleadings. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Anderson*, 477 U.S. at 256-257, 106 S.Ct. 2505. However, "[n]either 'conclusory allegations' nor 'unsubstantiated assertions' will satisfy the non-movant's burden." *Wallace v. Tex. Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir.1996).

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 2. Consequently, the "government may treat people differently because of their race only for the most compelling reasons." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). Thus, as the Supreme Court has held, "all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'" *Grutter v. Bollinger*, 539 U.S. 306, 326, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (quoting *Adarand*, 515 U.S. at 227, 115 S.Ct. 2097). To survive strict scrutiny, the racial classification must be "narrowly tailored to further compelling governmental interests." *Grutter*, 539 U.S. at 326, 123 S.Ct. 2325.

II. *Grutter v. Bollinger*

In 2003, the Supreme Court squarely addressed and decided the question of "[w]hether diversity is a compelling interest that can justify the narrowly tailored

use of race in selecting applicants for admission to public universities." *Id.* at 322, 123 S.Ct. 2325. The Supreme Court answered the question in the affirmative, finding that the University of Michigan Law School (the "Law School") had "a compelling interest in attaining a diverse student body." *Id.* at 328, 123 S.Ct. 2325. The Supreme Court also found the Law School's admissions program to be narrowly tailored despite the existence of race-neutral alternatives, including "percentage plans" similar to Texas' Top Ten Percent law. *Id.* at 339-40, 123 S.Ct. 2325. As the landmark case regarding the consideration of race as part of college admissions, the facts of Grutter deserve particular attention.

Michigan's Law School is one of the top, and most selective, law schools in the nation, routinely admitting 10% or less of applicants. *Id.* at 312-13, 123 S.Ct. 2325. In addition to selecting a highly qualified and promising group of students, the Law School sought, through its admissions process, to admit "a mix of students with varying backgrounds and experiences who will respect and learn from each other." *Id.* at 314, 123 S.Ct. 2325 (citation omitted). The "hallmark" of the admissions policy was "its focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential 'to contribute to the learning of those around them.'" *Id.* at 315, 123 S.Ct. 2325 (citation omitted). Importantly, admissions officials evaluated each applicant individually based on all of the information available, which included a personal statement, letters of recommendation, an essay on how the applicant would contribute to the life and diversity of the school, undergraduate grades,

and the applicant's score on the Law School Admission Test ("LSAT"). *Id.* The admissions policy specifically reaffirmed the school's commitment to "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers." *Id.* at 316, 123 S.Ct. 2325 (citation omitted). Specifically, the Law School sought to enroll a "'critical mass' of [underrepresented] minority students" in order to "ensure[e] their ability to make unique contributions to the character of the Law School." *Id.* (citations omitted).

This policy was challenged by Barbara Grutter, a white Michigan resident who was denied admission to the Law School in 1996, as a violation of the Fourteenth Amendment and federal civil rights laws. *Id.* at 316-17, 123 S.Ct. 2325. After an extensive bench trial, the district court "concluded that the Law School's use of race as a factor in admissions decisions was unlawful." *Id.* at 321, 123 S.Ct. 2325. The Sixth Circuit Court of Appeals, sitting en banc, reversed the district court's judgment and held that under Justice Powell's opinion in *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), diversity was a compelling state interest and the Law School's use of race was narrowly tailored. *Id.* The Supreme Court affirmed, holding "the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body." *Id.* at 343, 98 S.Ct. 2733.

In light of this Supreme Court jurisprudence, the Court now turns to the instant dispute.

III. Compelling Governmental Interest

Grutter clearly establishes that a public university "has a compelling interest in attaining a diverse student body." *Id.* at 328, 123 S.Ct. 2325. "[A]ttaining a diverse student body is at the heart of the Law School's proper institutional mission, and [ ] 'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'" *Id.* at 329, 123 S.Ct. 2325 (quoting *Bakke*, 438 U.S. at 318-19, 98 S.Ct. 2733). The Supreme Court noted several benefits stemming from a diverse student body:

> These benefits are substantial. As the District Court emphasized, the Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races." These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds."

Id. at 330, 123 S.Ct. 2325 (citations omitted). Furthermore, student body diversity "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." *Id.* (citation omitted). "In order to cultivate a set of leaders

with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id.* at 332, 123 S.Ct. 2325.

Crucial to the Supreme Court's finding of a compelling interest was the fact the Law School did not attempt "to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin," but rather sought a "critical mass" of minority students. *Id.* (quoting *Bakke*, 438 U.S. at 307, 98 S.Ct. 2733 (opinion of Powell, J.)). The Supreme Court noted that attempting to assure a specific percentage of a minority group would run afoul of the Supreme Court's prohibition on racial quotas and "outright racial balancing." *Id.* at 330, 123 S.Ct. 2325. Consequently, the definition of "critical mass" put forward by the Law School and approved by the Supreme Court was necessarily less than precise. Critical mass was described by Law School officials as "meaningful numbers," "meaningful representation," "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated," or "numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race." *Id.* at 318-19, 123 S.Ct. 2325.

Following the Supreme Court's decision in *Grutter*, the University of Texas Board of Regents passed a resolution authorizing each UT System school to decide "whether to consider an applicant's race and ethnicity as part of the [institution's] admission" policies, which must include "individualized and holistic review of applicant files

in which race and ethnicity are among a broader array of qualifications and characteristics considered," as well as periodic reviews to evaluate the efficacy and necessity of considering applicants' race. Pls.' Mot. for Part. Summ. J. Ex. 19, Aff. of Francie A. Frederick ("Frederick Aff.") Ex. A at 4-5.

After conducting its review, UT issued its *Proposal to Consider Race and Ethnicity in Admissions. See* Defs.' Cross-Mot. for Summ. J. Tab 11, Affidavit of N. Bruce Walker ("Walker Aff.") Ex. A, *Proposal to Consider Race and Ethnicity in Admissions*, June 25, 2004 at 24-25 ("*2004 Proposal*"). The *2004 Proposal* specifically addresses the rationale behind considering race as a part of the undergraduate admissions process:

> A comprehensive college education requires a robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders. This type of academic environment is a goal of the University of Texas at Austin and admission decisions must take into account this goal. The University of Texas at Austin handles a very large number of undergraduate applications and must select from among a highly qualified pool only the number of students in can accommodate. In light of the institutional goal, admission decisions result from both an assessment of the academic strength of each applicant's record and an individualized, holistic review of each applicant,

taking into consideration the many ways in which the academically qualified individual might contribute to, and benefit from, the rich, diverse, and challenging education environment of the University ...

Results indicate that, in a large percentage of [undergraduate] courses, some minority groups are represented by only one student or by none at all. The University of Texas at Austin did not have a critical mass of minority students sufficient to provide an optimal educational experience in 1996 (the pre-*Hopwood* period), and after seven years of good faith race-neutral admission policies, the University still has not reached a critical mass at the classroom level.

If The University of Texas at Austin is to accomplish its mission and fulfill its flagship role, it must prepare its students to be the leaders of the State of Texas. In the near future, Texas will have no majority race; tomorrow's leaders must not only be drawn from a diverse population but must also be able to lead a multicultural workforce and to communicate policy to a diverse electorate. The University has a compelling educational interest to produce graduates who are capable of fulfilling the future leadership needs of Texas.

Because the University's educational mission includes the goal of producing future educational, cultural, business, and sociopolitical

leaders, the undergraduate experience for each student must include *classroom* contact with peers of differing racial, ethnic, and cultural backgrounds. The proposal to consider race in the admission process is not an exercise in racial balancing but an acknowledgment that significant differences between the racial and ethnic makeup of the University's undergraduate population and the state's population prevent the University from fully achieving its mission. In short, from a racial, ethnic, and cultural standpoint, students at the University are currently being educated in a less-than-realistic environment that is not conducive to training the leaders of tomorrow. For the University to adequately prepare future leaders, it must include a critical mass of students from traditionally underrepresented backgrounds.

Critical mass, which is an adequate representation of minority students to assure educational benefits deriving from diversity, affects in a positive way all students because they learn that there is not "one" minority or majority view. In addition, the [Supreme] Court recognized that critical mass is essential in order to avoid burdening individuals with the role of "spokespersons" for their race or ethnicity. Thus, there is a compelling educational interest for the University not to

have large numbers of classes in which there are no students-or only a single student-of a given underrepresented race or ethnicity.

> The use of race-neutral policies and programs has not been successful in achieving a critical mass of racial diversity at The University of Texas at Austin. While the number of African American and Hispanic students has risen slightly above 1996 levels, these students still represent only 3% and 14%, respectively, of the entering freshman class. The race-neutral efforts have failed to improve racial diversity within the classroom. In fact ... for Fall, 2002, there were *more* classes with no or only one African American or Hispanic student than there had been in Fall, 1996. With so few underrepresented minorities in the classroom, the University is less able to provide an educational setting that fosters cross-racial understanding, provides enlightened discussion and learning, and prepares students to function in an increasingly diverse workforce and society.

2004 Proposal at 23-25 (citation and footnote omitted).

As articulated in the *2004 Proposal*, UT's underlying interest in its decision to consider race as one of the factors in its admissions process closely mirrors the justification provided for the Michigan Law School's use of race and

approved by the Supreme Court.[8] Both policies attempt to promote "cross-racial understanding," "break down racial stereotypes," enable students to better understand persons of other races, better prepare students to function in a multi-cultural workforce, cultivate the next set of national leaders, and prevent minority students from serving as "spokespersons" for their race. *Grutter*, 539 U.S. at 319-20, 330-33, 123 S.Ct. 2325; 2004 Proposal at 23-25. Notably, the Supreme Court also recognized in *Grutter* that "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer." 539 U.S. at 328, 123 S.Ct. 2325. Despite the obvious similarities between the admissions policy approved by the Supreme Court in *Grutter* and UT's policy, the Plaintiffs still contend UT's admissions program does not further a compelling governmental interest for two reasons. Pls.' Mot. for Partial Summ. J. at 12-18.

First, Plaintiffs argue UT's policy is "untethered to the educational benefits" of a diverse student body identified and approved by *Grutter*. *Id.* at 13. Specifically, Plaintiffs argue that because UT's diversity goals are "open-ended"-or, in other words, because UT has made no effort to define a percentage of its student body that must be filled by underrepresented minorities in order to achieve critical mass that therefore UT's use of race is not tied to the educational benefits of a diverse student body. Rather, Plaintiffs argue it "reflects a pursuit of racial

8. UT's policy is explicitly and admittedly based on the Law School's policy and the *Grutter* case.

balancing that reflects Texas' racial demographics." *Id.* at 14-15. Second, Plaintiffs also argue UT lacks a compelling interest because it has already achieved or exceeded "critical mass" through its race-neutral policies, most notably the Top Ten Percent law. *Id.* at 17. Plaintiffs argue that under Supreme Court precedent, "critical mass can be no greater than 20% minority enrollment." *Id.* at 18.

The Court finds both the Plaintiffs' arguments unpersuasive and finds UT has a compelling interest in student body diversity as articulated in *Grutter*. First and foremost, *nothing* in *Grutter* suggests a university must establish a specific percentage, or range of percentages, the achievement of which would satisfy critical mass. Plaintiffs cite evidence from the district court hearing and opinion in *Grutter* that the school officials considered "critical mass" to be somewhere between 10-20 percent of the student body. *Id.* at 15; *Grutter v. Bollinger*, 137 F.Supp.2d 821, 832 (E.D.Mich.2001). This evidence, however, is completely unpersuasive to prove the contention that a university must establish a specific percentage of minority enrollment for critical mass. To begin with, the district court that cited this evidence reached the opposite conclusion of the Supreme Court, and was reversed on appeal. Secondly, the actual policy adopted by the Law School *omitted* any reference to a specific figure or inclusion of a percentage "ceiling" because it "could be misconstrued as a quota." *Grutter*, 137 F.Supp.2d at 835. Finally, the *Grutter* decision clearly lacks any suggestion that there exists a specific percentage of minority enrollment that satisfies "critical mass" and above which a school lacks a compelling interest justifying

the use of race in admissions. Instead, the Supreme Court implicitly endorses the Law School's general definition of "critical mass" as "meaningful numbers," "meaningful representation," "a number that encourages underrepresented minority students to participate in the classroom and not feel isolated," or "numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race" by citing these definitions in its decision. Furthermore, the Law School's policy, which was found to be constitutional, did not have a specific percentage of minority enrollment cited as its goal. *Grutter*, 539 U.S. at 318-19, 123 S.Ct. 2325.

In fact, *Grutter* stands for the opposite proposition-a school which articulates a specific percentage of its student body that must be filled by minority students would violate the constitutional prohibition of racial balancing or racial quotas. *Id.* at 329-30, 334, 123 S.Ct. 2325. "Properly understood, a 'quota' is a program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups.' " *Id.* at 335, 123 S.Ct. 2325 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion)). "Quotas 'impose a fixed number or percentage which must be attained, or which cannot be exceeded.'" *Id.* (quoting *Sheet Metal Workers' v. EEOC*, 478 U.S. 421, 495, 106 S.Ct. 3019, 92 L.Ed.2d 344 (1986) (O'Connor. J., concurring in part and dissenting in part)). Establishing a specific percentage of minority student enrollment would violate the "paramount" characteristic of a constitutional race-conscious admissions program, namely a flexible and individual evaluation of each applicant. *Id.* at 336-37,

123 S.Ct. 2325. Thus, under *Grutter* the establishment of a specific percentage for critical mass would be a strong indicator of an impermissible racial quota or racial balancing, and consequently critical mass must be defined based on the educational benefits provided by the admission of the individual students rather than on the satisfaction of a numerical percentage. As was the policy of the Michigan Law School, UT has not established a specific percentage of minority enrollment that must be met, but rather considers race as simply one factor in its admissions decisions.

The Plaintiffs' argument that "critical mass" of minority enrollment cannot exceed twenty percent of total enrollment, in light of the foregoing law, is similarly without merit. As explained above, *Grutter* does not require an articulation of a specific percentage of minority enrollment for the achievement of critical mass. Nor does the case indicate, in any way, shape, or form, that "critical mass" is limited to, at most, twenty percent minority enrollment. The Court disagrees with Plaintiffs' claim that "Supreme Court precedent demonstrates that critical mass can be no greater than 20% minority enrollment." Pls.' Mot. for Partial Summ. J. at 18. The first case Plaintiffs cite is the district court's decision in *Grutter*, which was reversed on appeal and in which the Supreme Court found the Law School's admissions policy to be constitutional despite the lack of any upper limit or cap on its minority enrollment. The second case cited, *United States v. Virginia*, 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996), did not even involve the use of race as a factor in admissions. Instead, the case involved the

Appendix F

Virginia Military Institution's ("VMI") unconstitutional exclusion of women from admission. *Virginia*, 518 U.S. at 519, 116 S.Ct. 2264. The Supreme Court noted, "with recruitment, VMI could 'achieve at least 10% female enrollment'-'a sufficient "critical mass" to provide the female cadets with a positive educational experience.'" *Id.* at 523, 116 S.Ct. 2264 (citation omitted). Plaintiffs cite this statement, taken out of context, as support for its argument that public universities do not have a compelling interest that would justify the consideration of race as part of its admissions process once it has achieved 20 percent minority enrollment. This statement does not support the Plaintiffs' position. In context, the statement is made to support the claim that there was sufficient female interest in attending VMI such that, if admission was open to women, women would not be so isolated they would be unable to have a positive educational experience. *See Id.* The case in no way relates to the extent to which universities may consider an applicant's race, or for that matter her gender, in making admissions decisions. The last case Plaintiffs cite, *Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 283 F.Supp.2d 328, 357 (D.Mass.2003), also fails to establish a 20 percent ceiling for critical mass. In fact, reading beyond the cherry-picked sentences cited by Plaintiffs, *Comfort* recognizes the benefits derived from a diverse student body extend well beyond the 20% number:

> ... 20% is not a magical shut-off point for gains from intergroup contact. The gains occur along a continuum: as the racial composition of school populations creeps closer to balanced, racial stereotyping and tension is reduced and racial harmony and understanding increases.

Id. Furthermore, the 20 percent number cited in *Comfort* is the "figure below which members of a racial minority in a given setting feel isolated or stigmatized." *Id.* Thus, according to that logic, the *minimum* percentage of minority enrollment that must be achieved to avoid isolation or stigmatization is 20 percent, not the maximum, and that number applies to "a minority group," rather than to minority students as a whole. *Comfort* also recognizes there is no "magic number" for critical mass. *Id. Comfort* in no way establishes, or even endorses, a maximum of 20 percent minority enrollment for the achievement of critical mass-if anything, it endorses 20 percent enrollment per minority group as a *minimum.* As a result, the Court finds the fact the combined minority enrollment at UT exceeds 20 percent of the freshman class does not mean UT lacks a compelling state interest that justifies its continued consideration of race as part of its admissions process.

Plaintiffs also argue UT's use of race in admissions "is divorced from the educational benefits attained by the achievement of critical mass" because the policy primarily benefits African-American and Hispanic students and does not benefit other minority groups, specifically Asian-Americans. Pls.' Mot. for Part. Summ. J. at 16. However, Plaintiffs cite no evidence to show racial groups other than African-Americans and Hispanics are *excluded* from benefitting from UT's consideration of race in admissions. As the Defendants point out, "the consideration of race, within the full context of the entire application, may be beneficial to *any* UT Austin applicant-including whites and Asian-Americans." Defs.' Cross-Mot. for Summ. J. at 12; Ishop Dep. at 56:21-57:25.

Moreover, nothing in *Grutter* requires a university to give equal preference to every minority group. As the Supreme Court recognized, the Michigan Law School's policy did not mention Asians or Jews "because members of those groups were already being admitted to the Law School in significant numbers." *Grutter*, 539 U.S. at 319, 123 S.Ct. 2325. Throughout the opinion, the Supreme Court recognizes the Law School's interest in ensuring the admission of "underrepresented" minority students. *Id.* at 316, 318-20, 335-363, 338, 341, 123 S.Ct. 2325. It is undisputed that UT considers African-Americans and Hispanics to be underrepresented but does not consider Asian-Americans to be underrepresented. *See* Defs.' Cross-Mot. for Summ. J. Statement of Facts ¶ 92. However, the Court fails to see how UT's determination is improper or renders its consideration of race unconstitutional. As mentioned above, *Grutter* explicitly authorizes universities to exercise its discretion in determining which minority groups should benefit from the consideration of race and emphasizes the importance of including "underrepresented" minority groups.

The mere fact that the gross number of Hispanic students attending UT exceeds the gross number of Asian-American students attending UT does not mean Hispanics are not an "underrepresented" minority group. Hispanic students remain underrepresented at UT when their student population as a percentage of the entire UT population is compared to Texas' Hispanic and Latino population. According to the latest statistics from the United States Census Bureau, Texas' population is 36

percent Hispanic or Latino.[9] In contrast, in 2008 only 20 percent of admitted and/or enrolled UT students were Hispanic. *2008 Report* at Table 1.[10] Thus, compared to their percentage of Texas' population as a whole, Hispanics remain underrepresented. Asian-Americans, on the other hand, are largely *overrepresented* compared to their percentage of Texas' population. Plaintiffs suggest that any reference to demographic information in connection with the consideration of race in admissions constitutes an "attempt at engineering the racial demographics of UT Austin to correspond to the racial demographics of the State" and amounts to unconstitutional racial balancing. Pls.' Mot. for Part. Summ. J. at 16 n. 3. Plaintiffs are wrong. The mere concept of an "underrepresented" minority group, adopted and endorsed by the Supreme Court in *Grutter* and various other cases, necessarily involves the comparison of a minority group's representation at a university to its representation in society; otherwise, there would be no way to determine which minority groups qualify as underrepresented and which ones do not. The constitutional prohibition on racial balancing and racial quotas does not require universities to completely ignore societal demographics, but rather prohibits universities

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9. The Court takes judicial notice of the population estimates promulgated by the United States Census Bureau at http://quickfacts. census.gov/qfd/states/48000.html.

10. For comparison purposes, the Court notes the following statistics: African Americans-12 percent of the Texas population, 6 percent of UT's 2008 freshman class; Caucasians (non-Hispanic)-47.9 percent of the Texas population, 52 percent of UT's 2008 freshman class; and Asian-Americans-3.4 percent of the Texas population, 19 percent of UT's 2008 freshman class.

from insulating minority applicants from competition with all other applicants or reserving a fixed number of positions for minority students. *Grutter*, 539 U.S. at 334-35, 123 S.Ct. 2325. There is no evidence even suggesting UT insulates minority students from competition or reserves a fixed number of positions for minority students.[11] In fact, Plaintiffs themselves allege UT does not have a specific number or percentage of minority student enrollment that must be achieved in order to create a "critical mass." Thus, the Court finds the mere fact UT considers some minority groups "underrepresented" but not others does not indicate as a matter of law that UT's consideration of race in admissions is "divorced from the educational benefits attained by the achievement of critical mass." Pls.' Mot. for Part. Summ. J. at 16.

Plaintiffs also criticize UT's reliance on diversity statistics at the classroom level. Pls.' Resp. & Reply at 18-20. In 2002, as the undisputed evidence shows, 79 percent of UT classes had zero or one African-American students.[12] *2004 Proposal* at Table 8. UT offered over

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11. If Defendants are in fact attempting to match minority enrollment to state demographics, they are doing a particularly bad job of it, since Hispanic enrollment is less than two-thirds of the Hispanic percentage of Texas' population and African-American enrollment is only half of the African-American percentage of Texas' population, whereas Asian-American enrollment is more than five times the Asian-American percentage of Texas' population.

12. The Court refers to classes with five or more students. For classes with five to 24 students (a smaller sampling of classes, since it excludes classes with more than 24 students), 90 percent had one or zero African-American students.

5,631 classes that year, meaning approximately 4,448 classes had one or zero African-American students. *Id.* Similarly, 30 percent of these classes had zero or one Hispanic students; in other words, 1,689 classes had zero or one Hispanic students. Plaintiffs argue there has been no recognition of "individual classroom diversity" as a compelling state interest. *Id.* at 18. But Plaintiffs misconstrue the importance of the classroom diversity numbers. Defendants have not asserted a compelling interest in obtaining diversity in every single class-as the Plaintiffs argue, such an attempt would be largely unworkable without unreasonable and unheard of control over each student's schedule. Rather, the large-scale absence of African-American and Hispanic students from thousands of classes indicates UT has not reached sufficient critical mass for its students to benefit from diversity and illustrates UT's need to consider race as a factor in admissions in order to achieve those benefits. The benefits *Grutter* recognizes occur largely within the classroom; thus, the absence of minority students from a large number of classes demonstrates UT's ongoing need to improve diversity campus-wide.

In short, here is no "magic number" for the achievement of critical mass. The Michigan Law School policy, approved by the Supreme Court, did not include any specific percentage, or range of percentages, of minority enrollment that would automatically satisfy "critical mass." Instead, as articulated in *Grutter,* critical mass is defined by the educational benefits diversity provides, both to underrepresented minorities and to the student body at large. 539 U.S. at 318-20, 324-25, 328-33, 123 S.Ct. 2325 ("the Law School's concept of critical mass

is defined by reference to the educational benefits that diversity is designed to produce."). Despite the Plaintiffs' assertions to the contrary, 20 percent minority enrollment is no universal "ceiling" over which additional diversity ceases to be a compelling state interest. After conducting a comprehensive study, UT concluded it had not achieved critical mass and was not adequately providing the benefits from diversity to its students. *See 2004 Proposal.* Thus, like the Michigan Law School, UT decided to consider race as one of several factors in its admissions process in order to increase diversity. Based on the clear holding of the Supreme Court in *Grutter* and the undisputed facts of this case, the Court finds UT "has a compelling interest in attaining a diverse student body" sufficient to justify its consideration of race as a part of its admissions process. *Grutter,* 539 U.S. at 328, 123 S.Ct. 2325.

IV. Narrowly Tailored

Having found UT has a compelling interest in attaining a diverse student body, the Court must next determine whether UT's use of race in admissions is narrowly tailored to further that interest. *Grutter,* 539 U.S. at 326, 123 S.Ct. 2325. *Grutter* specifically addresses what it means for a race-conscious admissions program to be narrowly tailored:

> To be narrowly tailored, a race-conscious admissions program cannot use a quota system-it cannot "insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants."

> *Bakke*, 438 U.S., at 315, 98 S.Ct. 2733 (opinion of Powell, J.). Instead, a university may consider race or ethnicity only as a "'plus' in a particular applicant's file," without "insulat[ing] the individual from comparison with all other candidates for the available seats." *Id.*, at 317, 98 S.Ct. 2733.
>
> 539 U.S. at 334, 123 S.Ct. 2325. Furthermore:
> Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups ... Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.
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> *Id.* at 339, 123 S.Ct. 2325.

UT considers race in its admissions process as a factor of a factor of a factor of a factor. As described in exhaustive detail above, race is one of seven "special circumstances,"[13] which is in turn one of six factors that

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13. The other special circumstances factors are the applicant's family's socio-economic status, her school's socio-economic status, her family responsibilities, whether she lives in a single-parent home, whether languages other than English are spoken at home, her SAT/ACT score compared to her school's average score. *2008 Top Ten Report* at 2.

make up an applicants personal achievement score. *2008 Top Ten Report* at 2. The personal achievement score is one of three factors, along with two essays, that together make up the Personal Achievement Index ("PAI"). Lavergne Dep. at 57:14-17, 21:23. Finally, the PAI score is one of two elements that make up an applicant's ultimate AI/PAI score, which determines whether a non-Top Ten Percent applicant will receive admission. Ishop Aff. ¶ 12. At no point in the process is race considered individually or given a numerical value; instead, the file is evaluated in its entirety in order to provide a better understanding of the student as a person and place her achievements in context. Bremen Dep. at 22:8-13; Ishop Dep. at 13:9-14:19. Although an applicant's race is available throughout the application process, no admissions office employee or anyone else at UT monitors the racial or ethnic composition of the group of admitted students in order to decide whether an applicant will be admitted. Ishop Aff. ¶ 17.

UT's admissions policy shares many of the same features as the Law School's policy in *Grutter,* which is not surprising considering the parties agree UT's policy was based on the Law School's policy. The Supreme Court described the important features of the Law School's policy as follows:

> [T]he Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to

> applicants of all races. There is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single "soft" variable. Unlike the program at issue in *Gratz v. Bollinger* [539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003)] ... the Law School awards no mechanical, predetermined diversity "bonuses" based on race or ethnicity ... Like the Harvard plan, the Law School's admissions policy "is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight."

Grutter, 539 U.S. at 337, 123 S.Ct. 2325 (citations omitted). Furthermore:

> "The Law School's current admissions program considers race as one factor among many, in an effort to assemble a student body that is diverse in ways broader than race."

Id. at 340, 123 S.Ct. 2325. Similarly, UT's admissions policy provides a "highly individualized, holistic review" of every applicant, regardless of race or ethnicity, and considers multiple factors that contribute to "diversity" aside from race or ethnicity. UT does not accept any applicant based solely on her race or ethnicity, nor does UT assign any predetermined or numerical value to a person based on those characteristics. At UT, race is "one factor among many," which the University uses to assemble

a diverse student body. Thus, based on the obvious similarities between UT's program and the Supreme Court-approved program in *Grutter,* UT's admissions policy on its face appears to be narrowly tailored.

Despite these similarities, Plaintiffs argue UT's use of race in admissions decisions is not narrowly tailored because: 1) "it produces only minimal gains in the enrollment of under-represented minorities;" 2) UT failed to consider race-neutral alternatives that would achieve UT's diversity goals; 3) UT's consideration of race is over-inclusive because it benefits Hispanic students, who are not underrepresented; and 4) UT's consideration of race has no logical end point. Pls.' Mot. for Part. Summ. J. at 19-30; Pls.' Resp. & Reply at 22-29.

Plaintiffs' first argument attempts to force UT into an impossible catch-22: on the one hand, it is well-established that to be narrowly tailored the means "must be specifically and narrowly framed to accomplish" the compelling state interest, *Shaw v. Hunt*, 517 U.S. 899, 908, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996), but on the other hand, according to the Plaintiffs, the "narrowly tailored" plan must have more than a minimal effect. In support of their argument, Plaintiffs cite *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007). Plaintiffs are correct that Parents Involved criticizes the "minimal effect" the school's racial classification had on the assignments of students. 127 S.Ct. at 2759-61. However, read in context, this criticism is not meant to establish a new element to the strict scrutiny analysis, but rather is offered as

evidence that the school districts had failed to "consider[ ] methods other than explicit racial classifications to achieve their stated goals." *Id.* at 2760. *Parents Involved* reaffirms *Grutter's* standard that "[n]arrow tailoring requires 'serious good faith consideration of workable race-neutral alternatives,'" and criticizes the school districts for rejecting race-neutral alternatives "with little or no consideration." *Id.* (quoting *Grutter,* 539 U.S. at 339, 123 S.Ct. 2325). Thus, as described by the Supreme Court in *Parents Involved,* the question is not whether the means adopted by UT exceeds some undefined "minimal effect" on diversity, but rather whether UT has demonstrated "serious, good faith consideration of workable race-neutral alternatives."[14] *Id.* The undisputed evidence establishes that UT has done more than merely consider race neutral alternatives. The vast majority of UT students are admitted under the Top Ten Percent law, which Plaintiffs agree is a race-neutral policy, and the undisputed evidence establishes UT has instituted several scholarship programs intended to increase the diversity yield from acceptance to enrollment, expanded

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14. It should also be noted it is undisputed in the record before the Court that the consideration of race in admissions does increase the level of minority enrollment. The undisputed evidence establishes that even though it is not determinative, race is a meaningful factor and can make a difference in the evaluation of a student's application. Pls.' Mot. for Part. Summ. J. Mem. at 5; Pls.' Mot. for Part. Summ. J. Ex. 8, Dep. of Bruce Walker ("Walker Dep.") at 45:5-12. However, because race is not assigned any numerical value but rather considered as part of an individualized, holistic review of each applicant, the University does not have a specific number of admitted students who were admitted because of their race.

the quality and quantity of its outreach efforts to high schools in underrepresented areas of the state, and focused additional attention and resources on recruitment in low-performing schools. Orr Aff. ¶ 4. Despite these race-neutral efforts to expand diversity at UT, in 2004 the University determined it still lacked a diverse student body, as evidenced by the absence of African-American and Hispanic students in thousands of its classes. *2004 Proposal* at Table 8. To argue UT has failed to give serious, good faith consideration to race-neutral alternatives is to ignore the facts of this case-namely, that UT has used and continues to use race-neutral alternatives in addition to its limited consideration of race as part of its admissions process.

As the Supreme Court in *Parents Involved* recognized, "The point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance, which the Court explained would be "patently unconstitutional."" 127 S.Ct. at 2753 (quoting *Grutter*, 539 U.S. at 330, 123 S.Ct. 2325). The facts of *Parents Involved*, as set forth in that case, are clearly distinguishable from this case:

> In the present cases, by contrast, race is not considered as part of a broader effort to achieve "exposure to widely diverse people, cultures, ideas, and viewpoints"; race, for some students, is determinative standing alone ... It is not simply one factor weighed with others in

> reaching a decision, as in *Grutter*, it is *the* factor. Like the University of Michigan undergraduate plan struck down in *Gratz*, the plans here "do not provide for a meaningful individualized review of applicants" but instead rely on racial classifications in a "nonindividualized, mechanical" way.

Id. at 2753-54 (citations omitted). UT's admissions policy does not make race "*the* " factor nor rely on racial classifications in a "nonindividualized mechanical" way. UT has not only considered but continues to use race-neutral alternatives in addition to its consideration of race. Thus, the mere fact that UT's consideration of race does not have a large effect on diversity, due largely to the overwhelming presence of the Top Ten Percent law, does not mean the policy fails to further UT's compelling interest or is in some way not narrowly tailored for that goal.

These facts also address Plaintiffs' second argument, that "UT Austin failed to undertake 'serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.'" Pls.' Mot. for Part. Summ. J. at 22 (quoting *Grutter*, 539 U.S. at 339, 123 S.Ct. 2325). As described above, UT not only considered but in fact adopted race-neutral alternatives. However despite these efforts, UT concluded the diversity of its student body was lacking based, at least in part, on the absence of underrepresented minority students in thousands of classes. *2004 Proposal* at Table 8. UT thus determined it was necessary to consider race in

admissions in addition to continuing to use those race-neutral alternatives. As *Grutter* indicates, courts should provide some level of deference to a university in determining whether additional diversity is needed. *Grutter*, 539 U.S. at 328, 123 S.Ct. 2325 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer."). Furthermore, the Supreme Court recognized that the mere existence of race-neutral alternatives, like percentage plans, that could improve diversity does not preclude universities from considering race in admissions, as long as the university has given those alternatives "serious, good faith consideration." *Id.* at 339-40, 123 S.Ct. 2325. "Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative." *Id.* at 339, 123 S.Ct. 2325. The Plaintiffs essentially argue UT must exhaust every conceivable race-neutral alternative before it could consider race, a proposition specifically rejected by the Supreme Court. The Court thus explicitly finds the undisputed record and evidence establishes that UT has given serious, good faith consideration to workable race-neutral alternatives as required by *Grutter*.

Next, Plaintiffs argue UT's consideration of race is not narrowly tailored because it is over-inclusive in that it benefits Hispanic students, who are not underrepresented when compared to Asian-American students. This argument closely resembles the Plaintiffs' argument regarding whether UT has stated a compelling state interest, and fails for the same reason. The undisputed evidence establishes that the percentage of UT students who are Hispanic is less than two-thirds the percentage

of Texas' population that is Hispanic. Thus, in that sense, Hispanics are clearly an underrepresented minority group. The Constitution does not prohibit the government from considering demographic information in order to decide which groups are underrepresented. Instead, as *Grutter* indicates, the Constitution prohibits racial balancing and racial quotas, but there is no indication in *Grutter* or any other case cited by the Plaintiffs that universities are constitutionally required to ignore societal demographics. *Grutter*, 539 U.S. at 334-35, 123 S.Ct. 2325. The Court thus finds UT's intent to increase the enrollment of Hispanic students does not render their consideration of race in admissions unconstitutionally over-inclusive.

Finally, Plaintiffs argue UT's consideration of race in admissions is not narrowly tailored because it has "no logical end point." Pls.' Mot. for Part. Summ. J. at 30. The Plaintiffs are correct that in order to be narrowly tailored, the *Grutter* Court required that "race-conscious admissions policies must be limited in time." 539 U.S. at 342, 123 S.Ct. 2325. However, the Supreme Court also recognized that "[i]n the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity." *Id.* The undisputed evidence establishes that every five years UT's admissions process is evaluated specifically to assess whether consideration of race is necessary to the admission and enrollment of a diverse student body, or whether race-neutral alternatives exist that would achieve

the same results. Walker Aff. ¶ 16; *2004 Proposal* at 32. The first formal review of UT's use of race in admissions is scheduled to begin in the fall of 2009. *2004 Proposal* at 32. Thus, UT's admissions policy explicitly includes a periodic review to determine whether its consideration of race remains necessary to achieve a diverse student body, as required by *Grutter*.[15]

Accordingly, the Court finds UT's consideration of race in admissions is narrowly tailored. In fact, it would be difficult for UT to construct an admissions policy that more closely resembles the policy approved by the Supreme Court in *Grutter*. Nothing in *Grutter* prohibits a university from using both race-neutral alternatives and race itself, provided such an effort is necessary to achieve the educational benefits that stem from sufficient student body diversity. Such efforts should in fact be encouraged as the next logical step toward the day when consideration of a person's race becomes completely unnecessary. But, until that day, universities are not required to exhaust every possible race-neutral alternative as long as they consider those alternatives seriously and in good faith. UT not only considered several race-neutral alternatives, it implemented them and continues to use them to this day. But, despite those efforts, UT still found diversity lacking in its student body and thus decided to consider race as part of its admissions process. Under *Grutter* and *Parents Involved*, UT's decision and the ensuing admissions policy

15. The Court further notes that the Supreme Court "[took] the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable." *Grutter*, 539 U.S. at 343, 123 S.Ct. 2325 (citation omitted).

is narrowly tailored to further a compelling governmental interest.

CONCLUSION

The Texas Solicitor General summarized this case best when he stated, "If the Plaintiffs are right, *Grutter* is wrong." Absent Texas' Top Ten Percent law and the effect it has on UT admissions, the Court has difficulty imagining an admissions policy that could more closely resemble the Michigan Law School's admissions policy upheld and approved by the Supreme Court in *Grutter*. But if the Plaintiffs are right, and if the Top Ten Percent law somehow acts to make UT's consideration of race in admissions unconstitutional, then every public university in the United States would be prohibited from considering race in their admissions process because the same type of "percentage plan" which the Top Ten Percent law embodies could be established at any state university, and thus their failure to implement such a plan would constitute a failure to consider race-neutral alternatives. *Grutter* stands for exactly the opposite, as the decision explicitly permitted the consideration of race despite the existence and availability of race-neutral alternatives like percentage plans or lotteries. 539 U.S. at 340, 123 S.Ct. 2325. Consequently, as long as *Grutter* remains good law, UT's current admissions program remains constitutional.

In accordance with the foregoing:

IT IS ORDERED that LULAC's Motion for Leave to File *Amicus Curiae* Brief In Support of Defendants Out of Time [# 104] is GRANTED.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Partial Summary Judgment [# 94] is DENIED.

IT IS FURTHER ORDERED that Defendants' Cross-Motion for Summary Judgment [# 96] is GRANTED and the Court GRANTS summary judgment in favor of all Defendants on all claims.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Withdraw Suzzette Rodriguez Hurley as Attorney [# 115] is GRANTED as unopposed.

IT IS FINALLY ORDERED that all pending motions are DISMISSED AS MOOT.

JUDGMENT

BE IT REMEMBERED on the *17th* day of August 2009 the Court entered its order granting summary judgment on behalf of the Defendants, the Court enters the following:

> IT IS ORDERED, ADJUDGED, and DECREED that the Court finds the University of Texas at Austin's admissions policy, and specifically its consideration of race as part of the admissions process, to be narrowly tailored to further a compelling government interest and thus constitutional under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, U.S. Const. amend. XIV, § 1, and the federal civil rights statutes, 42 U.S.C. §§ 1981, 1983, and 2000d *et seq.*

Appendix F

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that the Plaintiffs Abigail Fisher and Rachel Michalewicz TAKE NOTHING in this cause against the Defendants the State of Texas; the University of Texas at Austin; Kenneth Shine, Chancellor of the University of Texas System in his official capacity; David B. Pryor, Executive Vice Chancellor for Academic Affairs in his official capacity; Barry D. Burgdorf, Vice Chancellor and General Counsel in his official capacity; William Powers, Jr., President of the University of Texas at Austin in his official capacity; the Board of Regents of the Texas State University System; John W. Barnhill, Jr., H. Scott Caven, Jr., James R. Huffines, Janiece Longoria, Colleen McHugh, Robert B. Rowling, James D. Dannenbaum, Paul Foster, and Printice L. Gary, as Members of the Board of Regents in their official capacities; and Bruce Walker, Vice Provost and Director of Undergraduate Admissions in his official capacity,[1] and that all costs of suit are taxed against the Plaintiffs, for which let execution issue.

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1. Plaintiffs previously voluntarily dismissed Defendants the State of Texas and Burgdorf, and substituted Kenneth Shine for Mark Yudof. To any extent necessary, this judgment shall also apply to the previously dismissed or substituted defendants.

APPENDIX G — ORDER DENYING PETITION FOR REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, DATED JUNE 17, 2011

United States Court of Appeals,
Fifth Circuit.

644 F.3d 301

No. 09–50822.
June 17, 2011.

Abigail Noel FISHER; Rachel Multer Michalewicz,

Plaintiffs–Appellants,

v.

UNIVERSITY OF TEXAS AT AUSTIN; David B. Pryor, Executive Vice Chancellor for Academic Affairs in His Official Capacity; Barry D. Burgdorf, Vice Chancellor and General Counsel in His Official Capacity; William Powers, Jr., President of the University of Texas at Austin in His Official Capacity; Board of Regents of the University of Texas System; R. Steven Hicks, as Member of the Board of Regents in His Official Capacity; William Eugene Powell, as Member of the Board of Regents in His Official Capacity; James R. Huffines, as Member of the Board of Regents in His Official Capacity; Janiece Longoria, as Member of the Board of Regents in Her Official Capacity; Colleen McHugh, as Chair of the Board of Regents in Her Official Capacity; Robert L. Stillwell,

as Member of the Board of Regents in His Official Capacity; James D. Dannenbaum, as Member of the Board of Regents in His Official Capacity; Paul Foster, as Member of the Board of Regents in His Official Capacity; Printice L. Gary, as Member of the Board of Regents in His Official Capacity; Kedra Ishop, Vice Provost and Director of Undergraduate Admissions in Her Official Capacity; Francisco G. Cigarroa, M.D., Interim Chancellor of the University of Texas System in His Official Capacity,

Defendants–Appellees.

Before *KING*, *HIGGINBOTHAM* and GARZA, Circuit Judges.

PER CURIAM:

The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

Voting for en banc rehearing were: Chief Judge Edith H. Jones, Judge E. Grady Jolly, Judge Jerry E. Smith, Judge Edith B. Clement, Judge Priscilla R. Owen, Judge Jennifer Walker Elrod, and Judge Catharina Haynes.

Voting against en banc rehearing were: Judge Carolyn Dineen King, Judge W. Eugene Davis, Judge Emilio M. Garza, Judge Fortunato P. Benavides, Judge Carl E.

Stewart, Judge James L. Dennis, Judge Edward C. Prado, Judge Leslie H. Southwick, and Judge James E. Graves.*

Upon the filing of this order, the clerk shall issue the mandate forthwith. *See* FED. R.APP. P. 41(b).

EDITH H. JONES, Chief Judge, with whom *E. GRADY JOLLY, JERRY E. SMITH, EDITH BROWN CLEMENT* and *OWEN*, Circuit Judges, join, dissenting:

By a narrow margin, this court has voted not to rehear this case en banc. I respectfully dissent. This panel decision essentially abdicates judicial review of a race-conscious admissions program for undergraduate University of Texas students that favors two groups, African–Americans and Hispanics, in one of the most ethnically diverse states in the United States. The panel purports to apply the Supreme Court's decision in *Grutter v. Bollinger*,[1] which authorized some race conscious admissions to Michigan Law School to foster educational "diversity." The panel's opinion, however, extends *Grutter* in three ways. First, it adopts a new "serious good faith consideration" standard of review, watering down *Grutter*'s reliance on strict narrow tailoring. Second, it authorizes the University's race-conscious admissions program although a race-neutral state law (the Top Ten Percent Law) had already fostered increased campus

* In 2009, the court decided to begin identifying the judges voting for or against en banc rehearing where a poll is taken and the request for en banc rehearing is denied.

1. 539 U.S. 306, 123 S.Ct. 2325 (2003).

racial diversity. Finally, the panel appears to countenance an unachievable and unrealistic goal of racial diversity at the classroom level to support the University's race-conscious policy. This decision in effect gives a green light to all public higher education institutions in this circuit, and perhaps beyond, to administer racially conscious admissions programs without following the narrow tailoring that *Grutter* requires.

Texas today is increasingly diverse in ways that transcend the crude White/Black/Hispanic calculus that is the measure of the University's race conscious admissions program. The state's Hispanic population is predominately Mexican–American, including not only families whose Texas roots stretch back for generations but also recent immigrants. Many other Texas Hispanics are from Central America, Latin America and Cuba. To call these groups a "community" is a misnomer; all will acknowledge that social and cultural differences among them are significant. Whether the University also misleadingly aggregates Indians, Pakistanis and Middle Easterners with East "Asians" is unclear, but Houston alone is home to hundreds of thousands of people from East Asia, South Asia and the Middle East. In Texas's major cities, dozens of other immigrant groups reside whose families have overcome oppression and intolerance of many kinds and whose children are often immensely talented. Privileging the admission of certain minorities in this true melting-pot environment seems inapt. But University administrators cherish the power to dispense admissions as they see fit, which might be reasonable except for two things: the Texas legislature has already

spoken to diversity, and the U.S. Constitution abhors racial preferences. Because even University administrators can lose sight of the constitutional forest for the academic trees, it is the duty of the courts to scrutinize closely their "benign" use of race in admissions.

1. That *Fisher* deviates from *Grutter*'s legal analysis is evident from a brief comparison of the cases. In *Grutter*, the Court approved the Michigan Law School's holistic, individual consideration of applications that included a student's race as a factor in addition to many other non-academic factors when the school pursued the "compelling interest" of having a "diverse" student body. The result of the policy was consequential, a tripling of the number of African–American and Hispanic law students, from 4% to 14.5% of the student body. *Grutter*, 539 U.S. at 320, 123 S.Ct. at 2334. Unlike the *Fisher* panel, however, the Supreme Court mentioned deference to university administrators' decisions at only two points in its opinion. *Grutter* expressly followed the narrow tailoring inquiry used in other cases assessing race-conscious governmental policies.

First, recognizing the unique constitutional interests of the academy, the Court "presume[d]" the good faith of the university within its discussion leading to the "conclusion that the Law School has a compelling interest in a diverse student body ...." *Grutter*, 539 U.S. at 328–29, 123 S.Ct. at 2338–39. But even for this purpose, the Court awarded only "a degree of deference" to administrators' academic decisions. *Id.* at 2339.

Second, the Court stated that narrow tailoring "require[s] serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." 539 U.S. at 339, 123 S.Ct. at 2345. This discussion of university decisionmaking was meant to *challenge the university,* not to bless whatever rationale it advances for racially preferential admissions. *Grutter* emphasized, by repeated references to prior decisions concerning racial preferences, that the government "is still 'constrained in how it may pursue [a compelling interest]: [T]he means chosen to accomplish the ... asserted purpose must be specifically and narrowly framed to accomplish that purpose.' " 539 U.S. at 333, 123 S.Ct. at 2341 (citing *Shaw v. Hunt*, 517 U.S. 899, 908, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996), a redistricting decision). Further, it held, narrow tailoring "must be calibrated to fit the distinct issues raised" by promoting racial diversity in higher education. *Grutter*, 539 U.S. at 334, 123 S.Ct. at 2341. Far from diluting narrow tailoring in order to defer to university administrators, the *Grutter* Court cited *Adarand*[2]—an employment case—to demonstrate consistency with prior equal protection jurisprudence. The Court explained in detail how the racial "plus factor" in *Grutter* still required minority applicants to compete with nonminority applicants; why this program was not an impermissible quota system; how nonminority candidates with lower academic scores were often admitted over minority candidates; why race-neutral alternative admission programs would not serve the university's particular interests; why nonminority students were not

2. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995).

"unduly burdened" by the racial factor in the admissions process; and finally, why an end point or periodic review of the process was necessary to comply with the Constitution.

Certainly, *Grutter* authorizes university officials, in certain circumstances, to pursue campus "diversity" using race as one factor in their decisionmaking. But on its face, *Grutter* does not countenance "deference" to the university throughout the constitutional analysis, nor does it divorce the Court from the many holdings that have applied conventional strict scrutiny analysis to all racial classifications.

The *Fisher* panel opinion, although occasionally difficult to understand, supplants strict scrutiny with total deference to University administrators.[3] First, the opinion's Standard of Review section mentions strict scrutiny in the first sentence, but goes on for several paragraphs counseling deference to universities. The panel, contrary to the Supreme Court's requirement that every race-conscious governmental decision bears a heavy burden of proof, issues this blanket approval:

> *Grutter* teaches that so long as a university considers race in a holistic and individualized manner, and not as part of a quota or fixed-point system, courts must afford a measure of deference to the university's good faith determination that certain race-conscious

3. I do not disagree with the panel's conclusion that following *Grutter*, we may presume a university's good faith in the decision that it has a compelling interest in achieving racial and other student diversity. But that is as about as far as deference should go.

> measures are necessary to achieve the educational benefits of diversity, including attaining critical mass in minority enrollment.
>
> *Fisher*, 631 F.3d 213, 233 (5th Cir.2011). This statement apparently conflates the University's compelling interest with narrow tailoring, or at least it misleads as to the importance of each prong of strict scrutiny analysis.

Second, immediately following this summary, the panel seeks support from the *Parents Involved* case, which followed *Grutter* and reiterated the Supreme Court's disapproval of "benign" race-based student assignment decisions in public schools. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007). But *Fisher* misquotes *Parents Involved* in saying that "[*Parents Involved*] invoked *Grutter's* 'serious, good faith consideration' standard, *rather than* the strong-basis-in-evidence standard that Appellants would have us apply [to the narrow tailoring inquiry]." *Fisher*, 631 F.3d at 234 (emphasis added). There is no support in *Parents Involved* for this artificial dichotomy, nor for *Fisher* 's later assertion that *Parents Involved* might have turned out differently—*i.e.*, racially discriminatory assignments might have been allowed—had there been no "other, more narrowly tailored means" to serve the school districts' purposes. *Id.* On the contrary, *Parents Involved* juxtaposed the narrow tailoring inquiries of *Grutter* and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (Kennedy, J., concurring), an employment decision. *Parents Involved*, 551 U.S. at 735, 127 S.Ct. at 2760. This

parallelism illustrated that *Grutter*'s "serious, good faith consideration" statement is not a new standard at all, but rather a way to express the classic requirement that narrow tailoring be more than a rote exercise in dismissing race-neutral alternatives.[4] With due respect to the panel, *Fisher* fails to apply the avowed continuity in principle of the Court's decisions. The panel's "serious, good faith consideration" standard distorts narrow tailoring into a rote exercise in judicial deference.

Third, the panel disturbingly implies that only procedural, not substantive, consideration of a university's race-conscious admissions program is necessary. *Fisher*, 631 F.3d at 231 ("Rather than second-guess the merits of the University's decision, ... we instead scrutinize the University's decisionmaking process ...."). *Grutter* nowhere countenances this radical dilution of the narrow tailoring standard.

Finally, the panel reinforces its overbroad approval or, more precisely, judicial abdication, in its Conclusion, which mentions a "serious, good faith consideration" standard twice and opines that the University's plan "is more a process than a fixed structure that we review." *Id.* at 246–47.

2. The effect of the panel's wholesale deference becomes clear when one considers the important factual distinction

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4. The *Fisher* panel is simply wrong in attempting to divorce *Grutter*'s standards from those of employment discrimination cases. *Fisher*, 631 F.3d at 233 (holding that employment cases "have little purchase in this challenge to university admissions."). Both *Grutter* and *Parents Involved* routinely invoke those cases.

between this case and *Grutter*. In *Fisher*, the plaintiffs challenged a post-*Grutter* University plan whereby 19% of the entering freshman class were subject to a race-conscious admissions process to increase diversity.[5] As Judge Garza's concurrence demonstrates, the number of students actually admitted under this racial preference policy is unclear, but it amounted to no more than a couple hundred out of more than six thousand new students. 631 F.3d at 260–61 (Garza, J., specially concurring).

The panel opinion asserts that the University's admission process is constitutionally acceptable because it is modeled closely after *Grutter*. Yet the difference is obvious. The Texas legislature statutorily mandated increased diversity in admissions by means of the Top Ten Percent Law. Under that race-neutral law, covering 80% of University admissions, the top ten percent of graduates from every Texas high school were automatically admitted, and many African-American and Hispanic students matriculated to the University. The challenged preferential policy was adopted on top of the unprecedentedly high numbers (compared to many other universities) of preferred minorities entering under the Top Ten Percent Law.[6]

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5. I follow Judge Garza's convention of using figures for enrolled Texas students for the same reasons identified in his concurrence. *See* 631 F.3d at 260 n. 19. If we were to expand consideration to out-of-state students, then 23.8% of enrollees would not have gained admission through the Top Ten Percent Law.

6. In dicta, the author of *Fisher* questions the efficacy, indeed the constitutionality of the Top Ten Percent Law, but no such issue was before the panel.

The pertinent question is thus whether a race-conscious admissions policy adopted *in this context* is narrowly tailored to achieve the University's goal of increasing "diversity" on the campus. Contrary to the panel's exercise of deference, the Supreme Court holds that racial classifications are especially arbitrary when used to achieve only minimal impact on enrollment. *Parents Involved*, 551 U.S. at 734–35, 127 S.Ct. at 2760. As the *Parents Involved* Court explained, "In *Grutter*, the consideration of race was viewed as indispensable in more than tripling minority representation at the [Michigan] law school—from 4 to 14.5 percent." *Id.* Despite the *Fisher* panel's artful use of statistics to describe the effect of the University of Texas's race-conscious plan, the contrast with *Grutter* is stark. As noted by the panel, more than 20% of the entering freshmen are already African–American and Hispanic, resulting in real diversity even absent a *Grutter* plan. The additional diversity contribution of the University's race-conscious admissions program is tiny, and far from "indispensable." It is one thing for the panel to accept "diversity" and achieving a "critical mass" of preferred minority students as acceptable University goals. It is quite another to approve gratuitous racial preferences when a race-neutral policy has resulted in over one-fifth of University entrants being African–American or Hispanic.

3. Finally, in an entirely novel embroidering on *Grutter*, the panel repeatedly implies that an interest in "diversity" *at the classroom level*—in a university that offers thousands of courses in multiple undergraduate schools and majors—justifies enhanced race-conscious

admissions. *Fisher*, 631 F.3d at 225 (citing studies that motivated the University's race-conscious plan based on classroom-level diversity); 237 (discussing the state's interest in classroom-level diversity as a constitutional matter); *see also* 240, 241, 243, 244, 245. Although the opinion may not expressly render a "holding" on the permissibility of fostering diversity at the classroom level, it conveys a clear message. The message is reinforced in Judge Garza's concurrence, which rejects the panel majority's implication that ("a university's asserted interest in racial diversity could justify race-conscious policies ... not merely in the student body generally, but major-by-major and classroom-by-classroom.") 631 F.3d at 253–54. (Garza, J., specially concurring).

The pernicious impact of aspiring to or measuring "diversity" at the classroom level seems obvious upon reflection. Will the University accept this "goal" as carte blanche to add minorities until a "critical mass" chooses nuclear physics as a major? Will classroom diversity "suffer" in areas like applied math, kinesiology, chemistry, Farsi, or hundreds of other subjects if, by chance, few or no students of a certain race are enrolled? The panel opinion opens the door to effective quotas in undergraduate majors in which certain minority students are perceived to be "underrepresented." It offers no stopping point for racial preferences despite the logical absurdity of touting "diversity" as relevant to every subject taught at the University of Texas. In another extension of *Grutter*, the panel opinion's approval of classroom "diversity" offers no ground for serious judicial review of a terminus of the racial preference policy. *Cf. Grutter*, 539 U.S. at 343, 123

S.Ct. at 2347 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.")

In the end, this case may determine the admissions policies of institutions of higher learning throughout the Fifth Circuit, or beyond, for many years. Reasonable minds may indeed differ on the extent of deference owed to universities in the wake of *Grutter,* but the panel's effective abandonment of judicial strict scrutiny in favor of "deference" at every step of strict scrutiny review contradicts *Grutter* and *Parents Involved.* The panel approves race conscious admissions whose utility is highly dubious in comparison with the effect of the Top Ten Percent Law. And the opinion's hints supporting "classroom diversity" are without legal foundation, misguided and pernicious to the goal of eventually ending racially conscious programs. I respectfully dissent from the denial of en banc rehearing.